Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No 154)

Review of Contract Law

Discussion Paper on Formation of Contract

discussion paper

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March 2012

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NOTES

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965[1] for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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The Commission would be grateful if comments on this Discussion Paper were submitted by Friday 29 June 2012.

Please ensure that, prior to submitting your comments, you read notes 1-3 on the facing page. Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

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Professor George Joseph Bell, *Commentaries on the Law of Scotland, and on the Principles of Mercantile Jurisprudence* (7^{th} edn, 1870)

Bell, *Principles*,
Professor George Joseph Bell, *Principles of the Law of Scotland* (10^{th} edn, 1899)

Burrows and Peel, *Contract Formation,*
Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (2010)

CESL,
Proposal for a Common European Sales Law (described in paragraph 1.3), available at: http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf

CFR,
Common Frame of Reference (described in paragraph 1.2)

Chitty on Contracts,
Hugh Beale et al (eds), *Chitty on Contracts: Volume I: General Principles* (30^{th} edn, 2008)

Christou, *Drafting Commercial Agreements*,
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CISG,
The United Nations Convention on Contracts for the International Sale of Goods (1980), available at: http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf

DCFR,
Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law (described in paragraphs 1.2-1.10);
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LR(S)B,

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PECL,

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PICC,

The UNIDROIT Principles of International Commercial Contracts (3rd edn, 2010), available at: http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf

Proposed CESL,

See entry for CESL above

RFC,

Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (Scot Law Com No 144, 1993), available at: http://www.scotlawcom.gov.uk/index.php/download_file/view/322/329/

RIPL,

Report on Interpretation in Private Law (Scot Law Com No 160, 1997), available at: http://www.scotlawcom.gov.uk/index.php/download_file/view/315/329/

RoS,

Registers of Scotland (http://www.ros.gov.uk/), who hold and maintain a number of registers including the Land Register of Scotland and the Books of Council and Session

RoW(S)A,

The Requirements of Writing (Scotland) Act 1995 (c 7)

SME,

The Laws of Scotland (Stair Memorial Encyclopaedia), 25 Vols

Vogenauer and Kleinheisterkamp, *PICC Commentary*,
Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2009)

Walker, *Contracts*,
David M Walker, *The Law of Contracts and Related Obligations in Scotland* (3rd edn, 1995)

Glossary

Advanced electronic signature

An advanced electronic signature is a secure method of applying a signature electronically. It guarantees both the identity of the signatory and also the integrity of the data to which it is attached. In other words, it is a guarantee that a certain person applied the signature and that the document to which the signature relates has not been subsequently altered. Once the Land Registration etc. (Scotland) Bill is passed and has come into force, it will be possible for an advanced electronic signature to confer probativity (see below) upon any electronic document. This is discussed in detail at paragraphs 7.30 and following.

Counterpart

A counterpart is a copy (often a duplicate, but there may be more than two copies) of a contract. Historically, a contract would be written out twice on a single piece of paper or other material, which would then be divided into two parts, called counterparts, one of which would be held by each party to the contract. In modern times counterparts are simply created by printing out the document the required number of times.

Execution in counterpart

This refers to the process by which a contract may be signed ("executed") by each party signing its own copy ("counterpart") and then exchanging it with the other party for that party's signed counterpart. This is a commonly used method for forming contracts subject to English law. This is discussed in detail in Chapter 6.

Probativity

A document is probative if, by visual inspection, it appears to be signed by the granter and also by a witness. The witness' name and address must also be stated. This is discussed in detail at paragraphs 7.16-7.29. Once the Land Registration etc. (Scotland) Bill is passed and has come into force, it will be possible for probativity to be conferred upon any electronic document by the application to it of an advanced electronic signature (see above).

Simple electronic signature

In contrast to an advanced electronic signature, a simple electronic signature is a signature created and / or transmitted electronically (eg a name typed at the end of an email or a signature sent on a fax) but without any guarantee that the person who appears to have signed did actually do so nor that the document has remained unaltered after signing. A simple electronic signature can be used to enter into a contract except one connected with land or one which is to be probative. Once the Land Registration etc. (Scotland) Bill is passed and has come into force, it will be possible for some forms of such an electronic signature to confer formal validity upon a contract written as an electronic document.

Testing clause

A testing clause appears in certain formal and non-electronic documents for which probativity (see above) is sought. Although less commonly used nowadays than in the past, the testing clause is a means of recording a witness' name and address. It may also contain other details about the signing process, such as where and when it took place. It generally appears just above the signatures at the end of the document. A testing clause or an equivalent (eg a handwritten note, close to the witness' signature, of his or her name and address) is required in order for a non-electronic document to be probative. This is discussed at paragraphs 7.17-7.18.

PART 1: INTRODUCTORY ISSUES

Chapter 1 Introduction

Background

1.1 This Discussion Paper is the second publication in our project reviewing contract law, which began early in 2010. The Eighth Programme of Law Reform, published in February that year, announced the Scottish Law Commission's return to a subject with which it has frequently been concerned since its foundation in 1965. The Programme states:

> "We propose to review the law of contract in the light of the publication in 2009 of the Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law (the DCFR). The DCFR provides a contemporary statement of contract law, based on comparative research from across the European Union and written in accessible and non-archaic English. The DCFR has a considerable amount to offer in the law reform process. It may be seen as an instrument to provide an important area of Scots law with a systematic health check, giving a basis for treatment where the law is found to be ailing or otherwise in need of remedial treatment. The DCFR is at least a good working platform for a series of discrete and relatively limited projects on contract law, akin in some ways to our work on trusts and having significance for the well-being of the Scottish economy."[1]

The DCFR

1.2 The DCFR is a document prepared by an academic group for the European Commission as the first stage in the possible production of what the Commission termed a Common Frame of Reference (CFR).[2] The academic group included a number of Scots lawyers, one of whom (former Scottish Law Commissioner Professor Eric Clive) played a leading role in the preparation of the final text of the document.[3] The CFR was intended to be either a legislative 'toolbox' for the European Commission, that is, an aid to better, more consistent and coherent European Union legislation in the field of contract law, or an 'optional instrument' for use by parties contracting in the European Union in place of national law.[4]

1.3 An Expert Group appointed to review the text of the DCFR for this purpose began work in May 2010.[5] The Group was instructed, however, to produce a text, not on contract law in general, but on sale of goods contracts only. The results of its work, which have become known as the Feasibility Study, were published for consultative purposes on 3 May 2011. The text drew significantly on the general contract law part of the DCFR, and also on

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[1] Scot Law Com No 220, 2010, para 2.16.
[2] On the CFR project and its antecedents see http://ec.europa.eu/consumers/rights/contract_law_en.htm.
[3] Other Scottish academics involved include Emeritus Professor John Blackie (University of Strathclyde) and Professor Hector MacQueen (University of Edinburgh).
[4] There has also been published an economic analysis of the DCFR: Pierre Larouche and Filomena Chirico (eds), *Economic Analysis of the DCFR: The work of the Economic Impact Group within the CoPECL network of excellence* (2010).
[5] See http://ec.europa.eu/justice/contract/expert-group/index_en.htm and Decision setting up the Expert Group on a Common Frame of Reference in the area of European contract law [2010] OJ L105/109. Professor Eric Clive was a special adviser to the Group.

its book on Sale of Goods.[6] On 11 October 2011 the European Commission published a proposal for a Regulation to which is annexed the Common European Sales Law ("the proposed CESL"), which is a revision of the Feasibility Study.[7] This Regulation, if passed, will form part of the domestic law of each of the Member States and will be an optional instrument that parties to cross-border sales contracts can choose as the law governing their contract. It will be available for business-to-consumer (B2C) sales as well as business-to-business (B2B) sales, in the latter case always provided that at least one of the parties is a small or medium-sized enterprise. Member States may choose, however, to allow the optional instrument to be used for domestic transactions, including ones which do not involve any small or medium-sized enterprise. We were involved with our colleagues in the Law Commission of England & Wales in the preparation of advice to the United Kingdom Government on this proposed CESL. The advice – which contains further background information on the nature of the proposed CESL – was published on 10 November 2011 and may be consulted on each Commission's website.[8]

1.4 In July 2010, shortly after the Expert Group began work, the European Commission published a Green Paper on European Contract Law canvassing various possibilities ranging from a non-binding model law to a full-blown European civil code displacing all domestic laws concerning obligations within the European Union.[9] The idea of an optional instrument was among the possibilities canvassed. The European Commission's consultation on these issues closed on 31 January 2011, and the joint call for evidence to inform a response to that consultation by the UK Ministry of Justice and the Scottish Government closed on 26 November 2010. Our submissions to the call for evidence may be viewed on our website.[10] Of the various possibilities for action outlined in the Green Paper, the optional instrument idea gained the most support, and is now being given effect by the proposed CESL. It remains unclear whether in addition to that optional instrument the additional idea of a 'toolbox' for use in the European Union is still in play, and if so whether it will be constituted by the DCFR or some further revision of that document.

1.5 Why are the DCFR and the ensuing developments in the European Union of interest for this Commission, with regard to the law of contract in particular?[11] First, the DCFR purports to be a modern or contemporary statement of the best rules of contract law for use in the European Union, and is based upon extensive comparative research and intensive collaboration by an international team of contract law experts. Seeing how Scots law measures up against this standard is thus an exercise of some interest. But it has a greater significance than that. As suggested in the Eighth Programme,[12] contract law is clearly a critical element in economic activity of all kinds, whether B2B, B2C, or between parties transacting with each other privately. It is thus very important that an area of law of such

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[6] Bk IV, Pt A.

[7] Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final, available at http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf.

[8] See http://www.scotlawcom.gov.uk/news/advice-on-european-sales-law/ and http://lawcommission.justice.gov.uk/publications/1698.htm.

[9] Green paper on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) 348 final, available at http://ec.europa.eu/justice/news/consulting_public/0052/consultation_questionaire_en.pdf.

[10] See http://www.scotlawcom.gov.uk/law-reform-projects/contract-law-in-light-of-the-draft-common-frame-of-reference-dcf/. This web page also contains our response to the EC's Green Paper and to the Feasibility Study.

[11] The DCFR is also relevant to the current SLC projects on Prescription and Title to Moveable Property (DP No 144, 2010), Trusts (DP No 148, 2011), and Moveable Transactions (DP No 151, 2011).

[12] See para 1.1 above.

significance for the Scottish economy, including the attraction of foreign business into Scotland, should be of the highest international quality. Scottish Ministers' interest in the contract law review proposed in our Eighth Programme was based primarily upon this consideration.

1.6 A second point is that if the DCFR is used in the European Union as a basis of any kind for harmonizing contract law or if an optional instrument such as the proposed CESL comes into existence for use by contracting parties as an alternative to domestic contract law, it will be necessary to ensure that Scots law at least compares favourably or keeps pace with such emerging European norms. In our Discussion Paper on Interpretation of Contract we noted similar thinking occurring in other major European jurisdictions.[13] Our joint project on Insurance with the Law Commission of England & Wales has also helped to make us aware of the need to keep domestic law in good repair if it is to have any influence as a model in European or even wider international developments.

1.7 A third point is that the comparative information in the DCFR facilitates our statutory task of keeping the law under review and obtaining information about the law of other countries in pursuit of that function.[14] Finally, the DCFR is descended from a number of instruments – notably the United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL) – which were used by this Commission in some of the contract law projects in the 1990s.[15] Since, as will be explained further below, we have set about our review by returning to the subject matter of these projects, it is appropriate to consider how far these models have themselves been developed in more recent texts.

1.8 The existence of the proposed CESL does not mean, however, that the DCFR has been superseded as the basis for our review of the law of contract. The former is limited to the contract of sale of goods while our review is directed towards the general law of contract, including but by no means limited to sales contracts. The DCFR text starts on the general law of contract (its Books I-III), supplemented by subsequent provisions on several specific contracts including not only sale but also lease of goods, services, mandate, commercial agency, franchise, distributorship, loan, personal security, and donation (Book IV.A-H).[16] The full version includes extensive commentary on each of the model rules as well as comparative notes on the laws of each of the jurisdictions to be found in the European Union Member States (including Scotland). In contrast, neither the proposed CESL nor the preceding Feasibility Study contain any commentary or comparative notes. The DCFR is therefore not only more directly relevant than the proposed CESL to a review of general contract law but also considerably clearer about the reasoning and comparative observations underpinning its provisions, giving it significantly greater value as a law reform

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[13] DP No 147, 2011, para 1.5. Since then there have been further developments, eg a conference in Spain, with German input, at the University of Santiago de Compostela in February 2011 to discuss the Spanish and French reforms.
[14] Law Commissions Act 1965, s 3.
[15] See further Nils Jansen and Reinhard Zimmermann, "Contract formation and mistake in European contract law: a genetic comparison of transnational model rules" (2011) 31(4) Oxford Journal of Legal Studies, 625.
[16] There are further Books on "benevolent intervention in another's affairs" (V), delict (VI), unjustified enrichment (VII), acquisition and loss of ownership of goods (VIII), proprietary security in movable assets (IX) and trusts (X). There is also an introductory statement and discussion of the principles underlying the DCFR, namely, freedom, security, justice and efficiency, and an annex of definitions of key words and phrases.

tool. This will be so whether or not the European Commission makes use of it as a 'toolbox' for its own legislative purposes.

1.9 Having said all this, the proposed CESL does draw directly upon many of the general contract law provisions of the DCFR, especially with regard to the formation of contract, the subject of our present Paper. It is clearly relevant to our project to know whether the proposed CESL has copied, modified or not used DCFR material, and we accordingly include and, where appropriate, discuss its relevant provisions within this Discussion Paper.

1.10 It should be emphasised that the objective of this review of contract law is not necessarily to adopt the rules in the DCFR or the proposed CESL as a legislative statement for Scots law. First and foremost review in light of the DCFR will, as the Eighth Programme says,[17] operate as a health check for the existing Scots law of contract. The results will determine whether legislative intervention is required in pursuit of the general objectives of simplification and modernisation, and to ensure that contract law provides an appropriate framework for economic activity in Scotland, be that entirely domestic, involving cross-border transactions or originating outside of Scotland. The check may also throw up issues that are not directly considered in the DCFR or the proposed CESL. In this Paper, for example, questions will be asked about the practice known as 'execution in counterpart'. The conclusion of our inquiry may be that the present law is satisfactory; or that it requires some patching; or that a full legislative statement would be useful (whether or not the DCFR or the proposed CESL is taken as the model for such a statement, and whether or not that statement changes the law as it presently stands). In this Paper we also suggest the possible development of a facility to be managed by Registers of Scotland (RoS) intended to ease the process of electronic contracting.

Previous SLC Reports as starting points

1.11 This Commission published a series of Reports on various aspects of contract law in the 1990s. Only one, the Report on Three Bad Rules in Contract Law,[18] has been implemented. The other four remain unimplemented:

- Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (Scot Law Com No 144, 1993) ("RFC");

- Report on Interpretation in Private Law (Scot Law Com No 160, 1997) ("RIPL");

- Report on Penalty Clauses (Scot Law Com No 171, 1999);

- Report on Remedies for Breach of Contract (Scot Law Com No 174, 1999).

The reasons for non-implementation are not easy to discern. There does not seem to have been any opposition to the substance of the Reports at the time. Those published in the later 1990s may have seemed more appropriate for consideration in the Scottish Parliament but the immediate priorities in civil law legislation after its establishment in 1999 were the

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[17] See para 1.1 above.
[18] Scot Law Com No 152, 1996, implemented by the Contract (Scotland) Act 1997. Note also the Requirements of Writing (Scotland) Act 1995, which implemented the Report on Requirements of Writing (Scot Law Com No 112, 1988).

abolition of feudalism and associated reforms of property law.[19] With the passage of well over a decade since the contract Reports were published, we do not think it right now simply to press as far as we are able for their implementation without further consideration of the issues raised within them. Quite apart from the general evolution of the law and related practice in Scotland over that period, international – and, in particular, European – developments in contract law need to be taken into account. The Reports themselves were prepared under reference to various instruments, notably CISG, PICC and PECL.[20] These instruments have in turn been influential and also developed in substance in the preparation of the DCFR and the proposed CESL. There is, therefore, a case for reconsidering the topics of the Reports, but this time taking into account the current European texts as well as the preceding instruments. Accordingly the first stage of the new review of contract law is a return to our unimplemented Reports on the subject.

Report on Formation of Contract ("RFC")

1.12 We make considerable reference throughout this Paper, especially in Part 2, to the Report on Formation of Contract, published in 1993,[21] and we consider that it may be valuable to summarise some of the conclusions it reached. It drew on many years of work by this Commission. Six consultative memoranda on the Constitution and Proof of Voluntary Obligations were published in 1977,[22] followed by a 1982 Consultation Paper on the 'battle of the forms'.[23] In 1992, following the ratification of the CISG, a further Consultation Paper on Formation was published.[24] The RFC drew upon this lengthy period of consultation and saw reform as an important step towards international harmonisation of the laws on contract formation, to aid efficiency and certainty in business transactions.

Approach to reform

1.13 The RFC used the CISG as a model for law reform because it "contains a modern, internationally agreed set of rules on the formation of certain contracts".[25] It was thought that there were advantages in making Scots law the same as that used elsewhere in the world in relation to contracts for the international sale of goods. It was also considered that the general rules on contract formation in the CISG were worth adopting as part of Scots contract law: analysis showed that many of the CISG rules were at least broadly in line with the Scots common law.

1.14 In addition, the RFC aimed to remove legal problems which might emerge through the increasing use of electronic communication, such as email and fax. The postal

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[19] This involved the implementation of a number of Reports of this Commission, eg the Report on Abolition of the Feudal System (Scot Law Com No 168, 1999), implemented by the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

[20] Note that PICC was described as "particularly useful" in RIPL, para 1.22; see also its paras 2.16, 3.7 and 8.15.

[21] Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (Scot Law Com No 144, 1993). We refer to this as the "RFC".

[22] Scottish Law Commission Memoranda Nos 34-39 (all 1977), available at http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/1970-1979/. There was also consideration of formation in the joint contract code project with the Law Commission of England & Wales between 1965 and 1973, the initial version of which was subsequently published: see Harvey McGregor, *Contract Code: drawn up on behalf of the English Law Commission* (1993), especially at pp 1-34.

[23] Consultation Paper on Contract Law: Exchange of Standard Term Forms in Contract Formation (1982), available at http://www.scotlawcom.gov.uk/download_file/view/523/410/.

[24] CP on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (1992), available at http://www.scotlawcom.gov.uk/download_file/view/896/410/.

[25] RFC, para 1.7.

acceptance rule was seen as a particular obstacle to the smooth conduct of trade in an electronic age. As we mention below,[26] this has become an issue of ever increasing importance since the RFC's publication in 1993.

Two specific areas for reform: the 'postal acceptance rule' and the 'battle of the forms'

1.15 For our present purposes, the RFC discussed two rules of Scots law of particular interest.[27] The first is the postal acceptance rule, which had already been considered in the 1977 Memorandum on Formation of Contract.[28] It was held that the rule, under which a contract entered into through letter or telegram can be held to be concluded when acceptance of the offer is posted, was inconsistent with the expectations of business people and consumers, who would not expect to be bound by a contract until an acceptance of their offer had reached them. It therefore caused uncertainty, confusion and difficulties with the law of contractual formation. The RFC recommended that the rules in Article 18 of the CISG be enacted in Scots law.[29] Had it been implemented, this would have had the effect of abolishing the postal acceptance rule.

1.16 Secondly, the RFC considered the 'battle of the forms', where an offer in the offeror's standard terms is met by a purported acceptance in the other party's standard terms.[30] The latter are typically different from those of the offeror, usually in areas of significance to the contract such as payment and liability questions. Despite the differences, which may mean that they have failed to achieve the objective appearance of agreement necessary for a contract to exist, the parties proceed to the performance of the transaction. Should a dispute then break out, there may be not only a question as to which of the different terms applies but even whether there is a contract at all.

1.17 As explained later,[31] previous reform proposals had not generally met with a favourable response on consultation; but one proposal, based on the CISG Article 19(2) and (3), had been more positively received.[32] While this involved changing the existing law, that change would not be substantial. We discuss this further in Chapter 6 below.

Subsequent developments

1.18 Despite a largely positive reception at the time, the RFC has not been implemented. It is clear, however, that the main problems it identified continue to exist in practice and they have perhaps become even more problematic in the intervening twenty years. This is particularly the case with the postal acceptance rule, in light of ever increasing use by contracting parties of common and sophisticated forms of electronic communication. This Paper thus provides an opportunity to revisit these issues in light of developments, both domestic and international, such as the DCFR and the proposed CESL.

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[26] See paras 1.19-1.20.
[27] Another topic discussed in the RFC and of current interest to this Commission is that of interpretation; this is the subject of our recent DP on Interpretation of Contract (No 147, 2011).
[28] No 36: see fn 22 above. It is discussed in paras 4.4-4.7 of the RFC.
[29] Art 18(2) begins: "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror."
[30] See paras 4.16-4.19 of the RFC.
[31] See para 5.19 below.
[32] These provisions of the CISG are set out in the table above para 5.16 below.

1.19 The rise of email, the internet and e-commerce since 1993 is a material part of the background to the present review of the law. Although the RFC gave some attention to electronic forms of transacting, emails were then used by only a limited number, mostly in universities and other research institutions, and the internet had scarcely begun to develop as a means of publishing information, never mind as a way of doing business, whether between businesses, between businesses and consumers, or between private individuals who might or might not be acting in the course of a business. The situation has thus been transformed in the last 20 years. In our own observation, email is now the normal method of distance communication between businesspeople and e-commerce involving consumers is growing much faster than retail sales in high street stores. None of these developments was anticipated in the RFC but the application of traditional formation rules in these new contexts has been the subject of much discussion and some case law, in Scotland and elsewhere. Any proposals for reform must take electronic contracting very seriously indeed.

1.20 Electronic contracting is also an important element in our discussion of the problem of 'execution in counterpart', and the possible solutions to its difficulties which we advance in this Paper.

Structure of the Discussion Paper

1.21 We have divided the Paper into three Parts. The first consists of the present introductory chapter. Thereafter, Part 2 offers an overview of formation of contract, beginning with general principles and drawing on relevant comparative material, and Part 3 discusses the particular issue of 'execution in counterpart'.

1.22 In a little more detail, Part 2 is made up of four Chapters. Chapter 2 discusses some general principles – such as a contract being in essence an agreement, and freedom of contract – which underpin the treatment of specific topics within the rules of contract formation which make up the remaining chapters. In Chapter 3 we deal with the offer, and in Chapter 4 with the acceptance. Chapter 5 discusses the 'battle of the forms'. In each of these Chapters we present the DCFR and the proposed CESL rules on formation of contract in a tabular form which enables them to be immediately compared with the legislative recommendations of the RFC (which were based upon the text of the CISG). We have also included in this comparison the relevant rules in the PICC, which built directly upon the CISG rules. Below each table we make a comparison with present Scots law, to identify similarities and differences, and we then set out our proposals for reform.

1.23 Part 3 is made up of Chapters 6 to 8 which focus on the practice known as 'execution in counterpart'. This topic is not dealt with in any of the international instruments save in so far as the more recent of these are at pains not to create any inappropriate barriers to the use of information and communications technology in the formation of contract. Our analysis here builds instead from our understanding of modern practice in this area and a legal analysis of its difficulties in Scots law.

1.24 We discuss in Chapter 6 the English law and practice relating to execution in counterpart, together with the relevant Scots law. Two cases which have hitherto largely been unnoticed are mentioned towards the end of the chapter. Chapter 7 deals with the law of delivery and the rules on probativity before introducing the notion of electronic signatures. We also make use of the prospective recognition of electronic documents in the Land Registration etc. (Scotland) Bill (introduced into the Scottish Parliament on 1 December

2011) as effective for some relevant legal purposes such as probativity. The chapter concludes with a discussion of how the existing law on delivery and probativity applies to electronically signed documents.

1.25 In Chapter 8 we propose some reforms which we think would enable parties in commercial as well as conveyancing transactions to take full advantage of the new possibilities afforded by electronic signatures. We also ask for views on the introduction by Registers of Scotland of a facility within which electronic contracts could be executed in probative form by all parties, wherever situated at the time.

1.26 Chapter 9 contains a list of proposals and questions for comment and in Appendix A we have put together a summary statement of the proposals to help consultees appreciate what is envisaged and the extent to which it would change the law, if implemented. This is, though, without any commitment to a Bill's eventual existence, substance or structure. Finally, Appendix B contains the names of our advisory group members.

1.27 In selecting topics for consideration, we have omitted some of the material that was covered in the RFC. Since we have already published a separate Discussion Paper on Interpretation of Contract,[33] and suggested there how any new approach might apply to statements made by individual parties in concluding contracts, there is no need for us to go into that question again here. The scope of this Discussion Paper is thus quite strictly confined to issues about the formation of contract.

General options for reform

1.28 Our proposals for reform in the sense of change in the law are limited. The major changes relate to the law on postal acceptances and execution in counterpart, with the possibility also of addressing problems that may exist in the battle of the forms. In addition, however, we canvas the possibility of a comprehensive statute on formation of contract. This is driven by two considerations which occurred to us in the process of writing this Discussion Paper. The first of these is the difficulty of reforming the postal acceptance rule and dealing with the problems of execution in counterpart unless these reforms are given a clear setting in an overall scheme. The second consideration is the number of areas in the law of formation where there is no direct Scottish authority in point. Sometimes these gaps can be filled by reference to English precedent but this is not always the case. An example is the effect of supervening insolvency or incapacity of an offeror or an offeree, a subject upon which there are conflicting views in the Scottish books.[34] A comprehensive statutory scheme would ensure that such questions had authoritative answers and clarify the impact of the specific reforms on the law of formation. Accordingly we ask:

1. **Would there be an advantage in having a comprehensive statutory statement of the law on formation of contract? Consultees may wish to reflect further upon this matter once they have considered the detailed discussion of the present law and specific possible reforms set out in later chapters of this Discussion Paper, as well as the summary of our proposals set out in Appendix A.**

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[33] DP No 147, 2011.
[34] We discuss this below in paras 3.32-3.42.

1.29 The possibility of a comprehensive statutory statement of the law on formation was also put forward by our predecessors in the RFC in 1993. That Report indicated that, were such a step to be taken, it would be necessary for the legislation to define its own scope quite carefully, "to make it clear that the new rules are confined to questions of formation and that questions of validity (for example, on the ground of error or incapacity) are not covered".[35] The draft Bill in the RFC accordingly contained a provision as follows:

> "1(2) This Act is without prejudice to the operation of any enactment or rule of law which –
>
> (a) provides protection against unfair contract terms, or protection for any special category of contracting party;
>
> (b) requires writing for the constitution of a contract or prescribes a form for a contract or requires a contract to be proved by writ or oath;
>
> (c) enables a contract to be concluded otherwise than by offer and acceptance; or
>
> (d) regulates any question relating to the formation of a contract which is not provided for by this Act."

We think that something similar would be of value in a comprehensive statutory statement, save that, the requirement of proof by writ or oath having been abolished by the Requirements of Writing (Scotland) Act 1995 ("RoW(S)A"), reference to that is no longer needed; and also that since in this present exercise we do deal with the conclusion of a contract otherwise than by offer and acceptance, paragraph (c) above would also be unnecessary. Paragraph (d) saves legislation which imposes requirements other than written form in the formation of contract: for example, the provision of information to consumers at the time of contracting.

1.30 The actual rules of formation were contained in a Schedule to the draft Bill in the RFC, which opened with this statement:

> "1. The rules in this Schedule govern only the formation of contract… In particular, except as otherwise expressly provided in this Schedule, they are not concerned with … the validity of the contract or of any of its provisions or of any usage …"

We think that any comprehensive statutory statement arising from the present exercise should contain similar provisions, although we would prefer to see the rules in the main body of the statute rather than in a schedule. Accordingly, we ask:

2. Do consultees agree that any comprehensive statutory statement of the rules on formation of contract should define its scope to make clear that it is not concerned with the validity of the contract or of any of its provisions?

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[35] RFC, para 2.2.

Advisory Group

1.31 We are very grateful to those who have provided advice to us in the course of the preparation of our Discussion Paper. We have particularly benefitted from specialist advice in relation to the execution of documents. In order to come up with proposals in this area we needed to gain an understanding of the problems currently faced in practice. The advisory group, whose members are listed in Appendix B, gave us invaluable assistance in this regard. Also, in coming up with proposals to remedy the current difficulties we have benefitted greatly from discussions with the Keeper and members of her staff at RoS.

Impact assessment

1.32 It is essential for us to attempt to assess the impact, particularly the economic impact, of any reform proposal that we may eventually recommended in the Report which will follow on from this Discussion Paper. To help us in this, we would be most grateful for any comments that consultees have on the matter. We would be especially grateful for any evidence with which we can begin to quantify the issues raised, whether that evidence relates to the current situation or is concerned with the possible effects of any reform of the law. Clearly, assessment of the likely economic impact of a possible reform depends substantially on the economic impacts of the present law. Hard evidence of the latter can be as difficult to obtain and judge as the effect of any reform.

1.33 Our initial view is that the economic impact of our tentative proposals is unlikely to be adverse and may, in some respects, be positive. The positive aspect will be the removal of uncertainty in the law which could otherwise only be resolved by judicial decision obtained at the expense of litigating parties. With regard in particular to execution in counterpart, implementation of our proposals may save commercial parties from different parts of the world the not insignificant costs involved in so-called 'signing ceremonies' at which all concerned must gather together in the same place at the same time in order to execute multiple copies of their contracts. While there would be expense for parties using the suggested electronic facility to be provided by RoS, we believe, following discussions, that the charges would be likely to be minor not only by comparison with the costs of the traditional 'signing ceremonies' but also with the values of the commercial contracts which we would expect to be the main type of contract for which the facility was used.

1.34 Further, a comprehensive statutory statement of the law on formation of contract will enable any party wishing to do so to know what steps Scots law requires for a contract to exist, and will be a visible demonstration of the system's commitment to up-to-date business and consumer-friendly rules in contract law. One desirable effect of that might be the encouragement of parties otherwise unconnected to the system to contract under Scots law. We have also been told that Scottish public authorities always contract under Scots law but can have difficulty (and so resultant costs in terms of delay) in demonstrating what Scots law is when negotiating contracts with non-Scottish parties. A comprehensive statutory statement might go some way towards resolving that particular difficulty.

1.35 The view that adverse economic effects are unlikely is based firstly on the belief that our reform proposals in relation to such matters as the postal acceptance rule will simply bring the law into line with existing business practice. Secondly, should there be a statutory restatement of the law on formation, a large part of it will be to the same effect as the present law, meaning again that little if any change to current practice is needed. Moreover,

the rules to be proposed would be, like the present law, 'default rules' which would leave it open to parties who wished to do so to set out their own rules as to how a contract is to be formed between them. Therefore if a party perceived a particular rule or set of rules to have adverse effects upon its interests, that party could devise an alternative scheme to which the law would give effect provided that any other parties involved had submitted to the scheme and it did not fall foul of any other legislation (for example, the law on unfair terms, which can be applied to non-contractual notices). This might help to overcome the possible adverse effect of discouraging parties from deciding to contract under Scots law.

1.36 These are only preliminary views, and we remain open to other perspectives. To assist us in our task of impact assessment we ask:

> **3. Do you know of any information or statistical data, or have any comments on any potential economic impacts either of the current law relating to the formation of contract or of any proposed reform of that law?**

Legislative competence

1.37 Nearly all the proposals in this Discussion Paper relate to the Scots private law of obligations,[36] which is not reserved in terms of the Scotland Act 1998. We are also of the view that the proposals, if enacted, would not give rise to any breach either of the European Convention on Human Rights or of Community law. Accordingly, with one exception, the proposals would, if enacted, be within the legislative competence of the Scottish Parliament. The exception concerns an apparent lacuna in consumer protection law with regard to rights of withdrawal from distance contracts, which may place Scottish consumers at a disadvantage by comparison with their peers elsewhere in the United Kingdom.[37] Our provisional proposal on this matter could be implemented only in the United Kingdom Parliament, since consumer protection is a reserved matter under the Scotland Act 1998.[38]

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[36] The meaning of "Scots private law" is given in s 126(4) of the Scotland Act 1998 and includes the law of obligations.
[37] See paras 3.28-3.29 below.
[38] Scotland Act 1998, s 29(2)(b) and Sch 5, Section C7. See para 3.29 below for a fuller discussion.

PART 2: AN OVERVIEW OF FORMATION OF CONTRACT

Chapter 2 General Principles

Introduction

2.1 The major focus of the Report of Formation of Contract ("RFC")[1] was the formation of contract by way of an offer from one party met by an acceptance from the offeree. In this chapter we consider a number of other important issues relating to the formation of contract which were not touched upon in the RFC but which we have become convinced warrant consideration. In particular, discussion of the general principle that contracts are agreements between two or more parties which they intend to take legal effect between them seems important. Offer and acceptance is one way of showing the agreement that is necessary for a contract. But it is not necessary to force the question of formation in every case to fit this model: for example, contracts may be created by parties' performances, or by complex oral negotiations resolved at some decisive meeting of the parties. The most significant practical example of formation without offer and acceptance is the formal written document which the parties intend to be their contract only after they have each signed it. Thus, the principle is particularly important to our discussion of the execution of such documents between distant parties, or 'execution in counterpart', which is discussed in Chapters 6 to 8. The principle also has important implications for the so-called 'battle of the forms', discussed in Chapter 5. Here the problem is that while the documents exchanged by the parties can be analysed in offer-acceptance terms, the end result will often be the appearance of no contract despite a real underlying agreement between the parties. The question is whether that underlying agreement should be given precedence over the apparent outcome of the offer-acceptance analysis.

2.2 Recognising the importance of the general principle that contracts are formed by parties' agreement leads naturally to another principle, that of party autonomy in contracting. As we will see, this is a key component of the texts forming the basis of our contract law review as well as, we think, of Scots law on the subject. The recognition of party autonomy in contracting has the vital consequence that most of the other rules to be discussed on formation are 'default rules' enabling parties to stipulate that they wish their own, different, rules on when a contract is concluded between them to apply.

2.3 Contracts are generally formed by a process of communication between parties. Another important general question is therefore when communications between parties take effect. The international texts underpinning our contract law review agree that, in principle, communications can only take effect when they reach the party to whom they are addressed, and again we think that in general this is also the position in Scots law. A notable exception is the postal acceptance rule, which we discuss in Chapter 4.

2.4 This chapter also touches upon two general questions raised by the international texts. The first is a rule which we think is also the general rule of Scots law: that, with some exceptions, contracts do not need to be in writing. Of course, in the exercise of their autonomy, parties may choose to put their contract in writing or use writing in the process of

[1] Scot Law Com No 144, 1993.

formation, and we do not propose any change to that position. Nor do we wish at this point to review the law on requirements of writing where these exist.[2] So we do not think that this is the occasion to seek to create a modern definition of writing for the purposes of the Scots law of contract (although we will discuss the definition of a signature when we consider execution in counterpart in Part 3). The second question arises from the recognition in the international texts of usages and practices between parties as relevant to the contract formation process. We have no doubt that this is also the position under present Scots law and that this should continue to be the case. But usages and practices may be relevant to other questions about contracts (for example, implied terms), and in this chapter we therefore propose that the question of whether to have any statutory provision on the subject should be left for another occasion upon which all the relevant issues might be considered together.

2.5 We turn now to discuss each of these principles in turn. The relevant texts are set out first, in tabular form, and we then offer a commentary and an analysis of them.

(i) Contract as agreement

CISG (RFC Draft Bill)	**14.** A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this *Schedule*. (*CISG Article 23)*
PICC	***2.1.1 Manner of formation*** A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement. ***2.1.13 Conclusion of contract dependent on agreement on specific matters or in a particular form*** Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form. ***2.1.14 Contract with terms deliberately left open*** (1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence. (2) The existence of the contract is not affected by the fact that subsequently (a) the parties reach no agreement on the term; or (b) the third person does not determine the term, provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

[2] Ie the Requirements of Writing (Scotland) Act 1995.

DCFR	***II.-1:101 Meaning of "contract" and "juridical act"*** (1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act. (2) A juridical act is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral. ***II.-4:101: Requirements for the conclusion of a contract*** A contract is concluded, without any further requirement, if the parties: (a) intend to enter into a binding legal relationship or bring about some other legal effect; and (b) reach a sufficient agreement. ***II:-4:102: How intention is determined*** The intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the other party. ***II.-4:103: Sufficient agreement*** (1) Agreement is sufficient if: (a) the terms of the contract have been sufficiently defined by the parties for the contract to be given effect; or (b) the terms of the contract, or the rights and obligations of the parties under it, can be otherwise sufficiently determined for the contract to be given effect. (2) If one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached. ***II.-4:211: Contracts not concluded through offer and acceptance*** The rules in this Section [*Section 2: Offer and acceptance)* apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed into offer and acceptance.
Proposed CESL	**Article 30** 1. A contract is concluded if: (a) the parties reach an agreement; (b) they intend the agreement to have legal effect; and (c) the agreement, supplemented if necessary by rules of the Common European Sales Law, has sufficient content and certainty to be given legal effect. 2. Agreement is reached by acceptance of an offer. Acceptance may be made explicitly or by other statements or conduct. 3. Whether the parties intend the agreement to have legal effect is to be determined from their statements and conduct. 4. Where one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached.

2.6 The simple statement in the CISG defining the moment of conclusion of a contract as being when an acceptance of an offer became effective, i.e. in general, when it 'reaches' the offeror, is the nearest that that text comes to defining a contract. While it does not expressly preclude the possibility that a contract may be concluded in other ways, the rule as stated may give the impression that offer and acceptance is a necessary condition for such conclusion, especially when most of its other specific rules are indeed about offer and acceptance. That this is inappropriate as a general rule of contract law emerges from the development of the CISG text by the PICC, which makes clear that a contract may also be concluded by conduct of the parties showing that they have reached agreement. The PICC also elaborates a further rule that parties may agree that their agreement is not to become effective as a legally binding contract until it has been reduced to a particular form or they have reached agreement on a particular matter. It also provides that there may be a contract even although the parties are not fully agreed on all terms.

2.7 The DCFR contains no statement like that of Article 23 of the CISG, although, as we will see in detail below,[3] it does have an elaborate structure of rules of offer and acceptance otherwise very similar to those in the CISG. For the DCFR the governing principle of contract formation is the existence of a sufficiently certain agreement between parties with an intention for it to have legal effect,[4] while it also states that there may be a contract even although the negotiations between the parties cannot be analysed in terms of offer and acceptance.[5] The proposed CESL states that agreement is reached by acceptance of an offer, which may be either explicit or by other statements or conduct indicating intention.[6] We do not think that this is meant to preclude the possibility of reaching agreement by methods other than offer and acceptance, although the matter could usefully be clarified in the text by the European Commission before the proposal becomes law.

2.8 The DCFR lays down that an agreement is sufficient if (a) the terms of the contract have been sufficiently defined by the parties for the contract to be given effect; or (b) the terms of the contract, or the rights and obligations of the parties under it, can be otherwise sufficiently determined for the contract to be given effect.[7] The proposed CESL, however, simply says that agreement is sufficient if the terms agreed, supplemented if necessary by the rules of the CESL itself, have sufficient content and certainty to be given effect as a contract.[8] Like the PICC both texts express a rule that, if one of the parties refuses to conclude a contract until the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached.[9] But the DCFR principle of party autonomy, discussed below in the next section, means that parties are also free to agree that there will be no contract between them until it has been reduced to writing and, if they so wish, signed in some form or other.

2.9 We think that if there were to be a general legislative statement of the law on formation of contract it would be necessary to go further than the simple statement in the CISG that a contract is formed by offer and acceptance, and that the other matters referred to in the DCFR and the PICC would also have to be brought in. In Scots law, as Professor

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[3] See Chs 3 and 4.
[4] DCFR II.-4:101.
[5] DCFR II.-4:211.
[6] Proposed CESL Art 30(2).
[7] DCFR II.-4:103(1).
[8] Proposed CESL Art 30(1)(c).
[9] DCFR II.-4:103(2); proposed CESL Art 30(4).

McBryde has observed, "[o]ffer and acceptance … should not be regarded as the necessary form of every contract."[10] The master concept of contract to which McBryde elsewhere refers is that of an "agreement between two or more parties … intended to establish, regulate, alter or extinguish a legal relationship and which gives rise to obligations and has other effects, even in respect of one party only".[11] Offer and acceptance is but one means of showing that the parties have reached agreement; there are other possibilities, some of which we have already mentioned.[12] McBryde also instances many everyday situations such as the purchase of a ticket to travel on a local bus.[13] Another example may be multi-party contracts to which the several parties agree at different times without necessarily going through a series of exchanges of offer and acceptance.[14] McBryde's chapter on offer and acceptance is preceded by one entitled "The Formation of a Contract", and in this he explores requirements for enforceable agreements in general – notably for present purposes an intention to create legal relations, agreement on the "essentials" of the contract, and certainty of terms.[15] These are precisely equivalent to the requirements set out in the DCFR and confirmed by the proposed CESL.

2.10 In his chapter on formation, McBryde also discusses the situation where the parties agree to put their contract into a single document or set of documents.[16] While the general rule of Scots law is that writing is not required for the constitution of a contract save in the case of contracts for the creation, transfer, variation or extinction of a real right in land,[17] nothing prevents parties from putting their contracts into writing if they so wish.[18] The main focus of McBryde's discussion of this topic is the relationship between the written agreement and the parties' preceding agreement;[19] but implicit throughout is that the former is a contract, formed by virtue of its having been executed by the parties with the intention that it should be the basis of the legal relationship between them thenceforth. Gloag possibly puts the matter more plainly when he states: "Parties may, indeed, put their agreement into writing …"[20] This situation is then another example of a contract formed without offer and acceptance. The parties' mutual consent is shown by the terms of the document itself and, where it has been signed by the parties, by those signatures.

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[10] McBryde, *Contract*, para 6.05. See also SME, vol 15, para 655.

[11] McBryde, *Contract*, para 1.03 (quoting H McGregor, "European Contract Code", published as a special issue/supplement in (2004) 8 Edin LR). Gloag, *Contract*, p 6, also defines contract in terms of agreement: "the consent of two or more parties to form some engagement or to rescind or modify an engagement already made"; the agreement may be "expressed in words, writing or conduct". See also MacQueen & Thomson, *Contract*, paras 1.9-1.14 and 2.2-2.8; SME, vol 15, paras 611 and 619; Walker, *Contracts*, paras 1.19-1.20; Gloag & Henderson, paras 5.03-5.08. Martin Hogg, *Promises and Contract Law: Comparative Perspectives* (2011), pp 50-52, argues that agreement becomes contractually binding only when it contains promises.

[12] See para 2.1.

[13] McBryde, *Contract*, paras 6.04-6.05. See also SME, vol 15, para 655.

[14] The classic example in the books is *Clarke v Earl of Dunraven (The Satanita)* [1897] AC 59 (yacht race competitors bound by competition rules as contract to which all had at various points subscribed). Other examples might be partnerships, unincorporated associations and the rules of tender competitions which bind all tenderers.

[15] McBryde, *Contract*, chapter 5. See also Gloag, *Contract*, pp 8-12; Walker, *Contracts*, paras 3.13 and 7.1, and chs 8 and 9; SME, vol 15, paras 656-658; MacQueen & Thomson, *Contract*, paras 2.4 and 2.64. On the increasing significance attached to intention to be legally bound in recent Scottish case law, see Gillian Black, "Formation of contract: the role of contractual intention and email disclaimers" 2011 Juridical Review 97.

[16] McBryde, *Contract*, paras 5.41-5.44, and also para 5.79.

[17] RoW(S)A, s 1(1). See further McBryde, *Contract*, paras 5.71-5.78.

[18] McBryde, *Contract*, para 5.79.

[19] Ibid, paras 5.41-5.44.

[20] Gloag, *Contract*, p 161.

2.11 A question for analysis in many cases may be whether the parties' unwritten or informal agreement prior to the drawing up of a formal document embodying the agreement is itself a contract. A range of possibilities exists and here we need only address three.[21] It is possible for the parties to make explicitly clear that they have no intention to be legally bound until the completion and execution of a formal document. If so, there will be no contract between them, however much their informal agreement may meet contract law's general requirements of consensus on the essentials of the agreement in question.[22] An alternative possibility is that the parties' informal agreement is a contract, but that its enforceability as such is subject to a suspensive condition of being put in more or less formal writing.[23] Thus the contract only becomes enforceable as such when the suspensive condition is fulfilled, although meantime the parties are obliged not to impede the condition's purification, for example by refusing to draw up a formal document of the kind required, or declining to sign it once it has been drawn up. A third possibility is for the parties to agree that an informal agreement amounting to a contract is enforceable as such but that it will be or is superseded by a subsequent formal document embodying the same agreement. It does not appear that the informal agreement will necessarily be void from uncertainty as a mere 'agreement to agree'.[24]

2.12 The rules in the DCFR and the other texts are consistent with present Scots law and, moreover, as we will show elsewhere in this Discussion Paper, of considerable practical importance. A statutory restatement of the Scots law of contract formation should therefore include similar rules. The most appropriate model to adopt for these purposes from those surveyed in the table above would, we suggest, be that provided by the Expert Group revision of the DCFR, which appears to cover all the points in a succinct and intellectually lucid fashion. It might, however, be useful also to make specific reference, as in the PICC Article 2.1.13, to the situation where one or more of the parties wishes there to be no contract until the agreement is recorded in a particular form, although we think this is covered by the proposed CESL rule that the parties must intend their agreement to have legal effect before it can have contractual force.[25]

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[21] Consider further Gillian Black, "Formation of contract: the role of contractual intention and email disclaimers", 2011 Juridical Review 97, and *Aisling Developments Ltd v Persimmon Homes Ltd* 2009 SLT 494 (OH) (court found no intention to create legal relations in parties' informal arrangements).

[22] *Karoulias (WS) SA v The Drambuie Liqueur Co Ltd (No 2)* 2005 SLT 813 (OH). We think that this case is not so much about "an implied agreement between the parties that each has the power to withdraw until formal signature of the written contract" (Ross Gilbert Anderson, "Fax and email in corporate completions" 2010 SLT (News) 73 at 73), as an express agreement that the parties do not intend legal relations or legal effect until the formal document is executed. For another recent example of an express exclusion of an intention to be legally bound in a pre-contractual document see *McDougall v Heritage Hotels Ltd* 2008 SLT 494 (OH). Note also the recent Supreme Court decision, *RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Company KG (UK Production)* [2010] 1 WLR 753 (UKSC), in which the parties were held to have impliedly waived their previous agreement that there would be no contract until the agreement was formally executed.

[23] Eg where parties agree "subject to contract"; see *Stobo Ltd v Morrisons (Gowns) Ltd* 1949 SC 184 (IH) per Lord President Cooper at 192.

[24] Parties wishing to ensure that their earlier informal agreement is indeed superseded by the more formal written contract may find the conclusive effect of an "entire agreement" clause under the Contract (Scotland) Act 1997 of assistance. This, we think, answers the question raised in Ross Gilbert Anderson, "Fax and email in corporate completions" 2010 SLT (News) 73 at 73 ("how the *Karoulias* interpretation squares with boiler plate "entire agreement" clauses is not free from difficulty.") See also fn 22 to para 2.11 above.

[25] See Vogenauer and Kleinheisterkamp, *PICC Commentary*, p 291.

(ii) Party autonomy

CISG (RFC Draft Bill)	**2.** The parties may exclude the application of this *Schedule* or … derogate from or vary the effect of any of its provisions. *(CISG Article 6)*
PICC	***1.5 Exclusion or modification by the parties*** The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.
DCFR	***II.-1:102 Party autonomy*** (1) Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules. (2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided. (3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware.
Proposed CESL	**Article 1** 1. Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules. 2. Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.

2.13 The RFC stated that an equivalent to Article 6 of the CISG would be "an essential part of the rules on contract formation", and added:

> "It would, for example, enable members of an electronic data interchange network to agree on rules among themselves on such matters as what would be regarded as an effective offer or acceptance or when a contract would be regarded as concluded."[26]

The CISG freedom of parties to exclude or derogate from the rules is confirmed by both the PICC and the DCFR, none of whose relevant provisions are mandatory.

2.14 Although it is difficult to find in Scots law sources any direct statement of similar effect to those in the DCFR, the PICC and the CISG, we think that they are consistent with the present law. Amongst other possibilities which could be mentioned, the principle of party autonomy allows parties to decide that no contract will be concluded between them until its

[26] RFC, para 2.3.

terms are recorded in writing and signed by each person,[27] or allows an offeror to specify a particular form or method of acceptance (for example, excluding the present postal acceptance rule by providing that an acceptance must reach the offeror to form a contract).[28]

(iii) When does a communication take effect?

CISG (RFC Draft Bill)	**15.** (1) For the purposes of this … *Schedule*, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence. (*CISG Article 24*)
PICC	***1.10 (Notice)*** (1) Where notice is required it may be given by any means appropriate to the circumstances. (2) A notice is effective when it reaches the person to whom it is given. (3) For the purpose of paragraph (2) a notice "reaches" a person when given to that person orally or delivered at that person's place of business or mailing address. (4) For the purpose of this Article "notice" includes a declaration, demand, request or any other communication of intention.
DCFR	***I.-1:109 Notice*** (1) … "Notice" includes the communication of information or of a juridical act. (2) The notice may be given by any means appropriate to the circumstances. (3) The notice becomes effective when it reaches the addressee, unless it provides for a delayed effect. (4) The notice reaches the addressee: (a) when it is delivered to the addressee; (b) when it is delivered to the addressee's place of business or, where there is no such place of business or the notice does not relate to a business matter, to the addressee's habitual residence; (c) in the case of a notice transmitted by electronic means, when it can be accessed by the addressee; or (d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could reasonably be expected to

[27] PICC Art 2.1.13 specifically mentions and allows for this: see the table above para 2.6.
[28] McBryde, *Contract*, para 6.72.

	obtain access to it without undue delay. (5) The notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice. …
Proposed CESL	**Article 10: Notice** 1. This Article applies in relation to the giving of notice for any purpose under the rules of the Common European Sales Law and the contract. 'Notice' includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose. 2. A notice may be given by any means appropriate to the circumstances. 3. A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect. 4. A notice reaches the addressee: (a) when it is delivered to the addressee; (b) when it is delivered to the addressee's place of business or, where there is no such place of business or the notice is addressed to a consumer, to the addressee's habitual residence; (c) in the case of a notice transmitted by electronic mail or other individual communication, when it can be accessed by the addressee; or (d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay. The notice has reached the addressee after one of the requirements in point (a), (b), (c) or (d) is fulfilled, whichever is the earliest. 5. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice. …

2.15 The RFC noted that under the CISG rules on contract formation it was important to know whether a communication from one party had 'reached' the other party, whether it was an offer, an acceptance, or a withdrawal or revocation of either of the former two. This was because until then, in general, no such communication took legal effect. It was accordingly necessary to define what would constitute reaching for these purposes. The PICC and the DCFR adopt and, in the case of the latter, elaborate the concept of 'reaching' in respect of what they call 'notices', a further concept which covers a variety of communications including, but not limited to, offers, acceptances and their withdrawal or revocation. The DCFR rules on when a unilateral juridical act becomes legally effective also apply to offers and acceptances.[29] The approach in the texts is an objective one: 'reaching' does not necessarily involve the intended recipient's actual knowledge, either that there has been a

[29] DCFR, vol 1, p 340.

communication from the sender or, even more so, what the contents of that communication may be.[30]

2.16 By comparison with the CISG and the PICC, the DCFR drops any express mention of the oral notice, although clearly the face-to-face or telephonic communication continues to be covered by its provisions. In general in these situations the recipient will have simultaneous knowledge both of the fact of communication and of the content of the communication. But any legal effect that other, non-oral forms of communication have applies from delivery to the recipient's residence or place of business, as the case may be. Thus, for example, a posted letter which has been delivered to its addressee's office but not yet opened will probably be regarded as having reached its recipient, at least from the point at which it would be reasonable for it to have been opened. The commentary to DCFR I.-1:109(4)(d) says that this covers "for example, leaving a message in a place which the addressee is known to check regularly".[31] Whether this would extend to having notified the addressee of a registered or couriered letter awaiting collection from the local depot of the post office or courier is, however, not clear.[32]

2.17 Unlike their predecessors, the DCFR (followed in this by the proposed CESL) add a considerable amount to all this in dealing specifically with the legal effect of electronic communications. The objective concept of 'reaching' the recipient continues to apply but it is given further definition. Under the DCFR and the proposed CESL an electronically transmitted notice 'reaches' its addressee when it becomes accessible to that party. Thus a fax received (but not necessarily printed out, if, for example, the machine has run out of paper) on the addressee's fax machine, or a voice mail recorded on the addressee's telephone message system can be taken as having 'reached' the addressee by becoming 'accessible' to that party even if not actually accessed.[33] In a context where the concept of 'business hours' is relevant, a communication that reaches the addressee's system outside those hours will become accessible for the purposes of the DCFR and the proposed CESL rules when the next period of business hours opens.

2.18 By emphasising accessibility to the addressee as the test of legal effectiveness in this way, the DCFR and the proposed CESL avoid some of the technical difficulties that may arise from the nature of the infrastructure through which an online communication makes its way from sender to addressee, described as follows by Eliza Mik:

> "Most online communications … rely on the client-server architecture. In the case of email, there are at least two originating devices (the sender's mail-client and the outgoing mail-server) and two terminating devices (the addressee's incoming mail-server and the mail-client). Is it the mail-client or the mail-server that should be taken into account? … [T]here may be substantial delays between the moment a message arrives at the server and the moment it is transferred to the client … [O]nline communications are characterized by a number of novel risks. The Internet is not like the post or the telephone. Despite its ubiquity, it does not (yet) have the uniformity of one global system. The Internet is heterogeneous – each of its component networks retains some individual characteristics. Routing from one network to another may involve a conversion between the 'idiosyncrasies of the two

[30] Vogenauer and Kleinheisterkamp, *PICC Commentary*, pp 205-206; DCFR, vol 1, p 113 (Comment C).
[31] DCFR, vol 1, p 113.
[32] Not under PICC provisions, according to Vogenauer and Kleinheisterkamp, *PICC Commentary*, p 206; but PICC has no equivalent to DCFR I.-1:109(4)(D) or the proposed CESL Art 10(4)(d).
[33] This probably also holds good under PICC: Vogenauer and Kleinheisterkamp, *PICC Commentary*, p 206.

original networks' and require the trans-coding, translation or reformatting of messages. Each of these operations aims to adapt the message to the requirements of the next step in the transmission. Such conversions are, however, not always successful. As a result, there are many reasons an email may not be delivered or be delivered in unreadable form."[34]

2.19 It has been suggested that the default rule as to when an email communication is received by its addressee should be arrival on the server that manages that party's email.[35] This is in line with the UNCITRAL Model Law on Electronic Commerce,[36] whose Article 15(2) provides:

> "Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
>
> a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
>
> (i) at the time when the data message enters the designated information system; or
>
> (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
>
> (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee."

2.20 Arrival at the recipient's server will generally make the communication accessible to the addressee and so satisfy the DCFR test, even if the addressee does not in fact access it. The objective requirement of 'accessibility' probably also means that the email which the addressee cannot access as a result of the operation of the network, or firewalls, or anti-virus filters is an effective notice; likewise if the communication fails because a recipient's inbox is full or is consigned by security systems to a 'suspected spam' folder. In all these cases the email is an effective notice because the obstacles to accessing the email are within the addressee's control: the addressee has selected the system by which it wishes to receive communications of the type in question. The position may be different if the sender is alerted by the system to the fate that has befallen its attempted communication, in which case the sender should know that the communication has failed and make another attempt.[37] Automatic 'out of office' or 'vacation' messages set up by an absent addressee may also postpone the effectiveness of an email notice but much might depend on the specificity and reliability of the absentee's message.

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[34] Eliza Mik, "Formation Online" in Furmston and Tolhurst, *Contract Formation*, paras 6.59-6.60. An example of when there may be more than two devices on each side of a transaction is when parties are using mobile devices such as blackberries, tablets, netbooks and laptops "which rely on the classic architecture but interpose an additional server between the incoming mail-server and the end-user. The message is pushed to the terminating device because the addressee previously configured a server or device to do so" (ibid, para 6.47, fn 131). The use of the concept of "accessibility" to determine whether or not an electronic communication has reached its recipient should mean that it does not matter which machine the latter uses to gain access. It also suggests, however, that automatic "out of office" response messages should make clear if a party is also not using any other means of access to incoming email communications.

[35] Donal Nolan, "Offer and acceptance in the electronic age" in Burrows and Peel, *Contract Formation*, p 76; Vogenauer and Kleinheisterkamp, *PICC Commentary*, p 206; Eliza Mik, "Formation Online", in Furmston and Tolhurst, *Contract Formation*, paras 6.55-6.67.

[36] Adopted in 1996; available at http://www.cnudmi.org/pdf/english/texts/electcom/05-89450_Ebook.pdf.

[37] Donal Nolan, "Offer and acceptance in the electronic age" in Burrows and Peel, *Contract Formation*, pp 76-79; the argument is founded on the principles stated by Denning LJ in *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327 at 333-4. See also Furmston and Tolhurst, *Contract Formation*, at para 6.57.

Scots law: communication generally required

2.21 The Scots law on when offers, acceptances and their withdrawal or revocation have legal effect is clear, at least in terms of general principle. With two exceptions – the postal acceptance rule and the acceptance of general offers (to be discussed further below)[38] – communication to the other party is required.[39] But an objective approach is taken in determining whether or not communication has occurred, and this may make effective a communication about the existence and content of which the recipient is subjectively unaware.

2.22 The most striking example of this objective approach to communication in the Scottish books is *Burnley v Alford*,[40] an Outer House case concerned with the revocation of an offer to sell property. The offeree (B) had been acting through an agent, whom he met on the morning of 12th September. The agent had left home that day before delivery of the post, while B had been away from home the previous night. Neither was therefore aware at the time of their meeting that the offeror (A) had sent to their respective home addresses a telegram revoking his offer which had been delivered in the first post that morning. B instructed his agent to send A a telegram of acceptance which was duly done in the early afternoon of 12th September. It was held that there was no contract, A's revocation having taken effect upon arrival at the home addresses of B and his agent prior to any acceptance. The Lord Ordinary (Ormidale) said:

> "It is proved that the cancellation telegrams of 11th September were properly addressed and were duly delivered in ordinary course prior to the hour, viz. 12.59, at which the telegram of acceptance was despatched to Colonel Alford. They would in ordinary course have been received and seen by both the pursuer and Mr Feather if these gentlemen had been present to receive them. But they happened to be absent from the addresses which they had duly furnished to the defender and they had not left anyone on the spot to represent and act for them. This was not business, and the matter in hand was essentially a matter of business. The rule of law in question appears to me to be applicable only when business rules and practices are observed. In my opinion therefore the pursuer is not entitled to plead that he accepted the offer of 4th September before he knew of the cancellation of the offer of sale. He ought to have known and would have known in the normal course of dealing. In none of the cases which were cited to me is there any indication that the bringing of the cancellation or recall of an offer home to the knowledge of the party holding the offer is of rigid application. In all of them the posting and the receipt of the letters of acceptance and recall were in the ordinary course of business transactions. It is one thing for the addressee to be absent from his office after business hours so that the delivery of the letter is delayed until his office opens the following day. It is a totally different thing for him to be absent from his office during business hours, with the result that the letter may lie on his desk unopened for a considerable length of time. In the present case the telegrams are said to have been left unopened or unread from the morning of the 12th September to the evening of the 14th. They ought to have been read on receipt, and, if they had been, the cancellation of the sale would have been known at the appropriate addresses long before the telegram was despatched from Bradford at 12.59."[41]

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[38] See, respectively, paras 4.8-4.14 and 4.15.
[39] The key case settling the general approach is *Thomson v James* (1855) 18 D 1. See also Gloag, *Contract*, pp 16-17; McBryde, *Contract*, paras 6.31-6.35, 6.53-6.55 and 6.109-6.113; SME, vol 15, para 6.28.
[40] 1919 2 SLT 123 (OH).
[41] Ibid at 128.

2.23 Although Lord Ormidale said that the facts of the case were special, the underlying principle of the decision appears to be reasonable, consistent with the approach found in the CISG, the PICC and the DCFR, and also supported by more recent House of Lords and Court of Appeal authority in England.[42]

2.24 A similarly objective approach is also apparent in the more recent Outer House decision of *Carmarthen Developments Ltd v Pennington*.[43] This case involved a decision on whether a postal notice purifying suspensive conditions in a contract took effect before the recipient solicitor, acting on behalf of his clients, sent a fax resiling from the contract. The Lord Ordinary (Hodge) set out what he took to be the general approach:

> "What amounted to communication depends in the first place on the contract. Where, as here, the contract did not exclude ordinary postal delivery … the delivery by a postman of the letters to the solicitors' office by pushing the envelope containing them through the letter box would have amounted to service of notice *whether or not the lawyers promptly opened the envelope*. The defender's solicitors would then have had possession of the notices. *It is the task of the recipients of mail to arrange for its prompt handling and the sender of a notice cannot be prejudiced by internal delays in so doing* … Thus it appears to me that the contract envisaged that service would be effected as soon as the mail arrived in the solicitors' office."[44]

2.25 The complicating factor in the case was that the notice was not delivered to the recipient's office by the postal service but was instead collected from the sorting office by the recipient solicitor before his own office opened for business. The notice was but one of a collection of letters addressed to the solicitor's firm, gathered by the sorting office in a zipped bag for convenience; the whole process of collection was in accordance with the firm's usual practice. It was also the recipient solicitor's habit to do this as part of the school run with his daughters; pausing en route to the school to leave the mailbag at his office before setting his children down and returning to the office to open the letters in the bag. On the day in question, however, the mailbag had been taken to the school before the solicitor's office and had therefore not been opened before the fax purporting to resile from the contracts took effect. Lord Hodge held that in these circumstances the notice had been communicated before the resiling fax had taken effect, saying:

> "In the present case the postman did not have an opportunity to deliver the mail to the offices of the defender's solicitors because it was the practice of Mr Soeder and his colleagues to uplift the mail from the Post Office at Jedburgh. In my opinion that practice placed the defender's solicitors in a similar position before the mail bag arrived at their office to that which they would have been in had the envelope fallen through their letter box. I do not consider that the fact that the Dickson Minto envelope was in a zipped mail bag with other letters prevented Mr Soeder from taking possession of the notices when he uplifted the mail on the Monday morning. He would have known that the mail bag contained letters. … The contracts in this case provided for service on the solicitors and parties would in all probability have expected postal service to be effected by a postman delivering the letters to the solicitors' offices. There is no suggestion that parties addressed their minds to the question of when service would be effected if a partner uplifted the firm's mail from the Post Office. I am satisfied that considerations both of sound business practice

[42] *Eaglehill Ltd v J Needham (Builders) Ltd* [1973] AC 992 at 1011; *Tenax Steamship Co v Owners of the Motor Vessel Brimnes* [1975] QB 929.
[43] [2008] CSOH 139, 2008 GWD 33-494. For commentary on other aspects of the case see para 2.34 below and Martin Hogg, "Contract Formation in the Electronic Age" 2009 13 Edin LR 121.
[44] Ibid, para 31, emphasis added.

and also of the attribution of risk once the letters were in Mr Soeder's control point to service of the notices occurring when he uplifted the mail bag. … Common sense points towards this answer. I recognise that different considerations might apply if at the weekend a member of staff of the defender's solicitors happened to be in the Post Office and chose to pick up a mail bag and leave it in the firm's office for consideration on the next working day, but those are not the circumstances of this case."[45]

2.26 There appear to have been no Scottish decisions on forms of communication other than the mail service, but textbooks generally accept the decisions in English cases about telexes,[46] which also take an objective approach to the question of when communication is effected by such means, and show that in general this means upon receipt at the point where in the ordinary course of business the recipient ought to have been aware that a communication had been made.

2.27 The generally objective approach of Scots law to when a communication is made is consistent with the approach found in the international texts forming the basis for our review, and we would not suggest any change to that position. It would be for consideration whether in any statutory restatement the rule should be stated in terms of 'notices', as in the PICC, the DCFR and the proposed CESL, or whether it would be preferable to follow the original CISG model and express the rule in terms of offers, acceptances and other indications of intention such as revocation of an offer. We ask:

4. Should any statutory restatement of the law on formation of contract provide that in general any relevant statement of a party's intention should have effect only when its intended addressee should have become aware that it had been made?

2.28 Scots law generally has a flexible approach as to when a communication of one party's intention should have become known to its addressee, and there are no rules specifying, for example, delivery to the addressee or the latter's place of business or habitual residence as in the international texts. The words of Lord Wilberforce in one of the leading modern English cases were cited and applied in the *Carmarthen* case: "No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie."[47] While this is attractive in the context of what may often be complex fact situations, it may be open to the criticism that only by going to court will it be possible to get an answer to the question in any given case. We ask:

5. In any statutory restatement of the law on formation of contract should there be specific rules on when a communication is taken to reach its addressee (for example, when the communication is delivered to the addressee personally or at its business address or habitual residence), or is this better left for assessment by the court in the circumstances of the case?

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[45] Ibid, paras 32-33.
[46] *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327 and *Brinkibon Ltd v Stahag Stahl und Stahlwarehandels GmbH* [1983] 2 AC 34. See further McBryde, *Contract*, para 6.118; SME, vol 15, paras 629, 641 and 643; MacQueen & Thomson*, Contract*, para 2.35.
[47] *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels GmbH* [1983] 2 AC 34 at 42, and see *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139, 2008 GWD 33-494 at para 33 (Lord Hodge).

2.29 The Scottish courts have so far had no opportunity to consider the question of when an electronic communication of a party's intention takes effect. We note that the international texts, here including the UNCITRAL Model Law on Electronic Commerce,[48] favour a broadly similar default rule, namely that the communication takes effect when it becomes accessible to its intended addressee, which is generally taken to be when the message enters the addressee's communications system and becomes accessible to that person. We think that this appears to be a workable rule and one which fairly apportions the risks of mis- or non-communication between the parties involved. Even if the answer to our previous question is generally in the negative, it may still be useful to have a clear rule for electronic communications along the lines suggested by the international texts. We therefore ask:

> **6. In any statutory restatement of the law on formation of contract would it be useful to have a specific rule on when an electronic communication is taken to reach its addressee (for example, when the communication becomes accessible to the addressee on its communications system)? Or can this too be better left for assessment by the court in the circumstances of the individual case?**

(iv) Definition of writing

CISG (RFC Draft Bill)	**12.** (3) For the purposes of this *Rule* "writing" includes telegram and telex. *(CISG Article 13)*
PICC	***1.11 Definitions*** "writing" means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.
DCFR	***I.-1:106 "In writing" and similar expressions*** (1) For the purposes of these rules a statement is "in writing" if it is in textual form and in characters which are directly legible from paper or another tangible durable medium. (2) "Textual form" means a text which is expressed in alphabetical or other intelligible characters by means of any support which permits reading, recording of the information contained in the text, and its reproduction in tangible form. (3) "Durable medium" means any material on which information is stored so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of the information.

[48] See para 2.19 above.

Proposed CESL	***Article 2 [Regulation]: Definitions*** (t) 'durable medium' means any medium which enables a party to store information addressed personally to that party in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

2.30 The RFC adopted the CISG rule on writing because, as we will see further below, another of the CISG rules recommended for adoption referred to 'writing';[49] so, "[a]lthough the definition in the Convention might be thought to be a little old-fashioned it is only an inclusive definition and, as it might conceivably help to resolve a doubt, we think that it should be included".[50] It is clear that the CISG definition of writing is now not only old-fashioned but also actually partly obsolete in its own terms: telegrams are no longer used in the formation of contracts in the United Kingdom since the service has been discontinued by BT.[51] While telexes are still in use in contemporary commercial contract practice, they have been largely superseded by the fax and, increasingly and perhaps now predominantly, email.[52] While, like the CISG, neither the PICC nor the DCFR imposes a requirement of writing for contracts to have validity,[53] they do have definitions of writing, set out above, the main purpose of which is the recognition of electronic writing as legally effective. The definitions are meant to be technologically neutral, or e-enabling, in line with the policy of allowing contracts to be concluded in electronic form which since 1999 has informed legislative developments in the European Union and its Member States, including the United Kingdom.[54] The fact that a document is in electronic form is not by itself to prevent it having effect as a contract or any other kind of juridical act. The proposed CESL provides no definition of writing at all and merely adapts the DCFR's concept of 'durable medium', in which certain pre-contractual information to be provided to consumers in off-premises and distance contracts must be recorded under Articles 18 and 19 of the proposed CESL.

2.31 We think that there is no need for any legislation on the formation of contract in general (which is the basis of our exercise) to define what is writing so as to ensure recognition of electronic communications and documents as such. This seems to be already well accepted by the courts and in legal practice. It is true that there are some difficulties

[49] See the table above para 4.31 below.
[50] RFC, para 2.10.
[51] But there are commercial services available on the internet that promote the use of telegrams for wedding greeting and other social purposes, often with a "retro" theme.
[52] For contracts formed by email exchanges see *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSIH 95; *Nicolas Prestige Homes v Neal* [2010] EWCA Civ 1552; *Immingham Storage Co Ltd v Clear plc* [2011] EWCA Civ 89. We have seen no case law that discusses contracts formed by exchange of text messages on mobile phones but this may yet occur. We note, for instance, that certain consumer products, such as ring tones, are standardly purchased by text. But the low value of such contracts means that they are inherently unlikely to lead to litigation, though they may give rise to consumer dissatisfaction and some form of dispute resolution. Technological developments will doubtless alter the methods of communication in the years to come, eg with the incipient rise of the 'smart phone', tablet computer and other electronic devices specifically designed to be portable and to connect to the internet.
[53] PICC Art 1.2; DCFR II.-1 :106(1). The proposed CESL provides that: "Unless otherwise stated in the Common European Sales Law, a contract, statement or any other act which is governed by it need not be made in or evidenced by a particular form" (Art 6).
[54] Directive on a Community framework for electronic signatures [1999] OJ L 013/12 ("E-Signatures Directive"); Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1 ("E-Commerce Directive").

where formal writing and signatures are necessary under RoW(S)A; but many of these are being addressed in the LR(S)B, and we discuss some of them further below in our Chapters on 'execution in counterpart'.[55] There is also already an inclusive statutory definition of 'writing' to be applied when the word is used in legislation, whether produced by Westminster or Holyrood:[56] it includes "typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form".[57] The starting point that writing is about representing or reproducing words in a visible form seems apt to cover most forms of electronic communication, and while it might be usefully elaborated in the manner found in the DCFR to deal with contemporary communications technology more directly, an exercise devoted to the formation of contract does not seem the appropriate place to start such a project. We therefore propose:

7. Any general legislative restatement of the law relating to formation of contract should not include any definition of 'writing'.

(v) Usages and practices

CISG (RFC Draft Bill)	**4.** (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to *the formation of* their contract … a usage of which the parties knew or ought to have known and which … is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. *(CISG Article 9)*
PICC	***1.9 Usages and practices*** (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.
DCFR	***II.-1:104 Usages and practices*** (1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves. (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such a usage would be unreasonable. (3) This Article applies to other juridical acts with any necessary adaptations.

[55] See also our Report on Land Registration: Vols 1 and 2 (Scot Law Com No 222, 2010), especially Vol 1, Pt 34.
[56] Interpretation Act 1978, s 5; Interpretation and Legislative Reform (Scotland) Act 2010, s 25.
[57] See Sch 1, para 1 to the Interpretation Act 1978 and sch 1, para 1 to the Interpretation and Legislative Reform (Scotland) Act 2010.

Proposed CESL	***Article 67: Usages and practices in contracts between traders*** 1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves. 2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties. 3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law.

2.32 The RFC noted that the "main sphere of application" for Article 9 of the CISG on usages and practices would be not so much the formation as the terms or contents of a contract. But the RFC suggested that the rule could "still be useful on occasions" in the context of formation:

> "For example, there may be a usage or established practice in a certain trade that a contract is concluded at a particular moment, such as the fall of an auctioneer's hammer. The article could also be useful in relation to the development of new practices on contract formation, such as those based on new electronic means of communication."[58]

2.33 The DCFR slightly re-jigs the CISG article, which this Commission itself revised to make it applicable only to the formation of contract. The DCFR allows the rule to be applied to juridical acts other than concluded contracts, so it can cover the acts involved in contract formation. The proposed CESL, however, appears to apply only to concluded contracts. Again here the question may be whether there should be such a rule applying to contract formation only, or whether it is best left as a general rule for all juridical acts. In present Scots law, the issue is covered through general legal concepts such as custom (by which terms may be implied into contracts), incorporation of terms in contracts as the result of a prior course of dealing between the parties, and personal bar.[59]

2.34 It may be that in an exercise limited to the formation of contract a provision on usages and practices is unnecessary and can be left to more general legal concepts. The example of terms being incorporated into a contract as a result of parties' prior dealings with each other rather than by their express agreement does, however, suggest the particular relevance of 'usages and practices' to formation questions. Earlier in this chapter we have seen further examples to which the concept seems relevant. In *Burnley v Alford*,[60] a party negotiating a contract by post had established a practice whereby the other party wrote to him at his home address; the former's failure to provide a system for checking his mail during an absence from home was taken against him in that he was held to be affected by a letter from the other party which had reached the home address but had remained unread. Likewise in *Carmarthen Developments Ltd v Pennington*[61] a solicitor who one day departed

[58] RFC, para 2.8.
[59] McBryde, *Contract*, paras 9.60-9.64.
[60] 1919 2 SLT 123 (OH); see para 2.22 above.
[61] [2008] CSOH 139, 2008 GWD 33-494; see paras 2.24-2.25 above.

from his usual practice in collecting and reading his mail was held to be affected by a letter not read at the time he would usually have done so, where that precise time was held to be vital to the legal effects of the communication in question. It is not clear, however, that the solicitor's practice in this regard was known to the sender of the letter.

2.35 Although at this stage we are not inclined to propose that any legislation on formation of contract include a provision on usages and practices we would be interested to hear consultees' views. Accordingly, we ask:

> **8. Should a provision on usages and practices be included in any statutory restatement of the law on formation of contract?**

Chapter 3 The Offer

Introduction

3.1 We now turn to the law of offer and acceptance. The rules in this area are important in at least two contexts. First, they indicate to parties wishing to form a contract steps that they can take to do so. Second, in cases where it is disputed whether or not the conduct and communications between parties gave rise to a contract, the rules provide a framework within which the question can be decided. As already indicated, offer and acceptance is not the only method of forming a contract or of determining that one exists.[1] But it is important nonetheless that the rules in this area of contract law are as clear and certain as possible, and also congruent with what persons who may lack legal advice would reasonably expect the law to be. We think that the present law may fail to meet these standards in at least some respects.

3.2 For clarity, our treatment is divided into two chapters – the present chapter on offers and the subsequent chapter on acceptances – but these chapters should be read together wherever possible. We have decided to treat the battle of the forms in another chapter altogether because it is arguable that the problem there is not one of offer and acceptance at all and the subject requires its own particular legal treatment within the scope of the general principle that contract is formed by agreement.[2] Whatever the merits of that argument, we have found it preferable to clarify the rules of offer and acceptance prior to addressing the difficulties posed by the battle of the forms.

3.3 This chapter covers the following issues about offers: (i) definition; (ii) when an offer becomes effective; (iii) withdrawal; (iv) revocation; (v) irrevocability and consumer withdrawal rights; (vi) rejection; (vii) material change of circumstances, effect of death or other loss of capacity; (viii) effect of insolvency; (ix) effect of delay.

3.4 In broad terms, Scots law is generally consistent with the CISG, the DCFR and the proposed CESL in relation to the matters described as (i) to (vi) in the list above. In respect of the other matters the law is either uncertain or somewhat different from the international models, as discussed in greater detail later in this chapter.

(i) Offer

CISG (RFC Draft Bill)	**5.** (1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance … (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal. (*CISG Article 14)*

[1] See para 2.1 above.
[2] See Ch 5.

PICC	***2.1.2 Definition of offer*** A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.
DCFR	***II.-4:201 Offer*** (1) A proposal amounts to an offer if: (a) it is intended to result in a contract if the other party accepts it; and (b) it contains sufficiently definite terms to form a contract. (2) An offer may be made to one or more specific persons or to the public. (3) A proposal to supply goods from stock, or a service, at a stated price made by a business in a public advertisement or a catalogue, or by a display of goods, is treated, unless the circumstances indicate otherwise, as an offer to supply at that price until the stock of goods, or the business's capacity to supply the service, is exhausted.
Proposed CESL	**Article 31: Offer** 1. A proposal is an offer if: (a) it is intended to result in a contract if it is accepted; and (b) it has sufficient content and certainty for there to be a contract. 2. An offer may be made to one or more specific persons. 3. A proposal made to the public is not an offer, unless the circumstances indicate otherwise.

3.5 On the definition of an offer the DCFR again slightly re-jigs the CISG and is itself reworked by the proposed CESL, but the substance is largely the same. In essence, in all three texts (and PICC) an offer is defined as a proposal from one party which is sufficiently definite in its terms to form a contract and also manifests an intention to be legally binding on the offeror should it be accepted by the party to whom it is addressed. We think, as did our predecessors in the RFC,[3] that this definition of 'offer' is consistent with the existing law of Scotland. It is, however, quite difficult to find an authoritative definition in either textbooks or judicial statements.[4] The recent case of *William Lippe Architects Ltd v Innes*[5] provides a

[3] RFC, para 3.2.
[4] Neither Gloag, *Contract* or McBryde, *Contract*, actually defines an offer. There is a definition in *SME*, vol 15, para 620 ("a statement of terms which the offeror proposes to the offeree as the basis of an agreement, coupled with a promise, express or implied, to adhere to these terms if the offer is accepted"), which is also deployed in MacQueen & Thomson, *Contract*, para 2.10. This is very close to the DCFR/CISG texts, with the use of the concept of "promise" being equivalent to the latters' "intention to be bound". Walker, *Contracts*, para 7.6, says that "an offer is a conditional promise, an expression by one party to another or others of willingness to become legally bound by contract to that other, or one or more of the others on certain terms, conditionally on the other party being willing to become bound to the counterpart performance." He cites Stair, *Institutions* I, 3, 9, which, however, simply distinguishes an offer from a promise in that it needs acceptance to become obligatory. See further Martin Hogg, *Promises and Contract Law* (2011), pp 210-219. For English law, Chitty on Contracts, para 2-003 and Furmston and Tolhurst, *Contract Formation*, para 2.14 (the latter quoting J Beatson, *Anson's Law of*

useful illustration of a situation in which a detailed business proposal is deemed insufficiently definite in its terms to constitute an offer because it leaves open alternative methods for determining price. The manifestation of an intention to be legally bound is also, ultimately, a question of the construction of the proposal, even in the context of particular situations where there was once thought to be a presumption in the opposite direction, as in social and domestic arrangements or the relationship between a church and its ministers.[6] There is much case law in which the courts have decided whether or not particular forms of wording amount to an offer on this ground.[7]

3.6 With regard to 'general offers', or proposals made to the public rather than to a specific person – for example, advertisements, shop window displays, the circulation of catalogues of goods for sale, and consumer-oriented e-commerce websites – THE CISG states that these are invitations to treat unless the contrary is clearly indicated whereas the DCFR simply says that they are offers if they otherwise meet the requirements of the general definition of an offer. The proposed CESL reverts to something like the CISG formula, however, in providing that proposals made to the public rather than to one or more specific persons are not offers unless the contrary is clearly indicated. The CISG and the proposed CESL are here more consistent with the way in which Scots law tends to analyse such proposals.[8] Proposals to the public at large, or to a group of persons, which are not offers would include such communications as advertisements merely indicating the existence of a product on the marketplace (for instance, a brand of perfume), requests for the submission of tenders or estimates for the supply of goods or services, and the circular or website indicating the availability of a product or a service to customers making orders.[9] There are, however, several cases in which proposals made to the public have been held to be offers, the key features of such proposals being sufficient certainty about their content and the manifestation of an intention to be legally bound in the event of acceptance.[10] The classic example is provided by the English case of *Carlill v Carbolic Smoke Ball Co Ltd* (followed many times in Scotland) where a commitment in a newspaper advertisement of a product supposed to ward off influenza to pay £100 to any consumer who fell victim to the illness despite use of the product was held to be more than 'mere puff' because the advertisement included a statement that the defendant had deposited £1000 in a bank to meet its potential liabilities, showing the "sincerity of [the defendant's] promise to pay this £100", i.e. a clear intention to be bound by the terms of the advertisement.[11]

Contract (28th edn, 2002), p 32, and W E Peel, *Treitel: The Law of Contract* (12th edn, 2007), p 9), provide definitions of "offer" which are also similar to the DCFR/CISG texts.

[5] [2006] CSOH 182, 2007 GWD 2-22 (Lord Clarke), affirmed on this point [2007] CSIH 84, paras 24-26.

[6] See *Percy v Board of National Mission of the Church of Scotland* 2006 SC (HL) 1; *MacDonald v Free Presbyterian Church of Scotland* [2010] UKEATS/0034/09/BI (10 February 2010); *President of the Methodist Church v Preston (formerly Moore)* [2011] EWCA Civ 1581.

[7] See Gloag, *Contract*, pp 17-24; McBryde, *Contract*, paras 6.14-6.25. See also Furmston and Tolhurst, *Contract Formation*, paras 2.22-2.29, discussing "weak words of commitment" and "words expressly denying a commitment". In the context of distinguishing an offer from an invitation to treat under English law, Chitty on Contracts, para 2-009, discusses inconclusive wording and the fact that use of the word "offer" is not determinative of the existence of an intention to be bound.

[8] Gloag, *Contract*, pp 21-24; McBryde, *Contract*, paras 6.14-6.17 and 6.22-6.23. This parallel can also be drawn with English law: Chitty on Contracts, paras 2-010-2-021, describes a number of public proposals and explains that most are considered in law to be invitations to treat unless, in some instances, contrary intention is shown.

[9] English law is generally to the same effect: Chitty on Contracts, paras 2.017 and 2.022.

[10] Gloag, *Contract*, p 22; McBryde, *Contract*, paras 6.25-6.27.

[11] *Carlill v Carbolic Smoke Ball Co Ltd* [1893] 1 QB 256 (CA) at 261-2 (Lindley LJ). For Scottish cases following *Carlill* see *Hunter v General Accident Fire & Life Assurance Corp* 1909 SC (HL) 30; *Law v Newnes* (1894) 21 R 1027; *A & G Paterson v Highland Railway Co* 1927 SC (HL) 32. See also *Petrie v Earl of Airlie* (1834) 13 S 68.

3.7 We think that the definition of an offer stated in the international texts is in general consistent with Scots law. We therefore propose:

9. In any statutory restatement of the law on formation of contract, an offer should be defined as a proposal made to one or more specific persons containing sufficiently definite terms to form a contract and indicating the intention of the offeror to be bound if the offer is accepted by the other party or parties.

3.8 Also consistent with Scots law, we think, is the proposition that a proposal made to the general public rather than to one or more specified persons is not an offer unless it otherwise meets the general criteria defining an offer, that is to say, it contains sufficiently definite terms to form a contract and indicates the intention of the party making the proposal to be bound by it if it is accepted by another party or parties. We say nothing here of the further possibility that such proposals to the public may be unilateral promises in Scots law (which may, however, be matter for discussion on another occasion).[12] We accordingly further propose:

10. In any statutory restatement of the law on formation of contract (and without prejudice to the possible application of the law on unilateral promises), it should be stated that a proposal made to the general public and so not to one or more specified persons is not an offer unless it otherwise meets the criteria for an offer.

3.9 An innovation in the DCFR by comparison with the CISG or the PICC, is a rule that advertisements, catalogues and displays of goods or services for sale *by a business at a stated price* are offers to supply until the stock is exhausted or the business becomes incapable of supplying the service. Present Scots (and English) law would tend to see these as invitations to treat, so that it is the customer responding to the statement who makes the offer and the business whose stock or capacity is potentially affected which may then accept or decline that offer.[13] But the current law also in effect enables the business which has stock never the less to refuse the customer's offer, for example because the former harbours doubts about the latter's creditworthiness. Again, however, the view that advertisements are generally invitations to treat and not offers seems to apply even in cases where the business contracts only on cash terms and does not give credit to its customers.[14] The DCFR approach is thus more protective of the customer's interest in securing a contract and holding a business to a stated price than the present law.[15] It may well therefore be attractive to consumers.

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[12] Note that, again like Scots law, the DCFR recognises the enforceability of what it calls a "unilateral undertaking" even without acceptance by the party to whom it is made (DCFR I.-1:103(2), II.-4:301-303). See further Martin Hogg, *Promises and Contract Law* (2011), pp 228-230.

[13] See the cases cited in McBryde, *Contract*, para 6.15; SME, vol 15, paras 621-624; Walker, *Contracts*, paras 7.2 and 7.6-7.12; and discussion in MacQueen & Thomson*, Contract*, paras 2.13-2.15.

[14] McBryde, *Contract*, para 6.15, fn 46; see eg *Partridge v Crittenden* [1968] 2 All ER 421 (newspaper advertisement of "Cage and Aviary Birds" for sale at 25 shillings each held to be an invitation to treat and not an offer, although only cash transactions appear to have been contemplated).

[15] DCFR, vol 1, p 294 (Comment D). There may be an issue here with obvious mispricing by a business, a situation which has quite frequently occurred with consumer-oriented websites. The correct approach to this subject appears to us to be through the law of error rather than the law of formation. See, eg, the Singaporean case *Chwee Kin Keong v Digilandmail.com Pte Ltd* [2004] 2 SLR 594, [2004] SGHC 71.

3.10 It is worth noting that, despite the existing rules already discussed making proposals to the public generally invitations to treat rather than offers, the approach of the DCFR to advertisements announcing the availability of a stock of goods or services each at a stated price is not necessarily inconsistent with retail practice in Scotland or the wider United Kingdom. In self-service stores, once the shelf is empty of stock, no offer is being made under the DCFR rule.[16] It is common for advertisements announcing the availability of goods or services to consumers to indicate that they subsist only while stocks remain or capacity is not exhausted. Consumer-oriented websites use this technique too, not infrequently stating exactly in advance of any transaction how many goods remain available in the supplier's warehouse or at a particular branch, or how many seats remain unfilled on the airline flight.

3.11 On the other hand, although the DCFR rule was included in the Feasibility Study, it was dropped for the proposed CESL. This may suggest that, despite the rule's attractiveness from a consumer point of view, it was seen as containing potential problems. In particular, such a rule could create real difficulties for internet traders, who not uncommonly, but through administrative error rather than with intent, misprice goods or services advertised as available on their websites. Such traders could therefore, under the proposed rule, find themselves bound to supply an indefinite number of customers placing orders at the stated price, with orders far outnumbering the available stock. The DCFR rule also gives rise to other, more general uncertainties: for example, what constitutes the stock of a trader with multiple outlets? Is it only the stock at the outlet where the customer seeks to make the purchase, or is it the stock available across the whole chain? The problem may become still greater where the trader's business is international, with outlets in jurisdictions beyond the United Kingdom.

3.12 In our view, while there are some attractions in a basic rule like that found in the DCFR, in particular from the point of view of consumer protection, these are offset by some of the uncertainties mentioned above. Its introduction would have to be balanced at least by being subject to party autonomy (as indeed it is in the DCFR). This would enable traders, for example, to define what constituted stock for the purposes of the rule, or to go further and declare that a statement on a website about the availability of goods or services at a certain price was not an offer, or lay down a procedure for the conclusion of a contract for the supply of goods or services. Well-advised traders would doubtless do this,[17] with the possibilities for abuse of this autonomy by rogue traders being picked up by consumer protection law; but the smaller-scale trader unable to afford legal advice might be exposed to undue risk by a default rule that its exposure of goods and services at a stated price is an offer.

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[16] Furmston and Tolhurst, *Contract Formation*, para 2.39. The display of goods on the supermarket shelf being an offer need not mean that when customers put goods in a basket or trolley there is then and there acceptance and a contract concluded so that they cannot subsequently change their minds without being in breach of contract. Acceptance would take place, it is suggested, when an indication of assent reaches the offeror, ie when customers pass their goods over the screen that activates the bar codes or allow the cashier to do so, placing them on the list of goods purchased and to be paid for by the customer.

[17] Eg Amazon.co.uk uses the following clause on its website: "When you place an order to purchase a product from Amazon.co.uk, we will send you an email confirming receipt of your order and confirming the details of your order. Your order represents an offer to us to purchase a product which is accepted by us when we send email confirmation to you that we've dispatched that product to you (the 'Dispatch Confirmation E-mail'). That acceptance will be complete at the time we send the Dispatch Confirmation E-mail to you." We understand that clauses of this kind are in widespread use by commercial internet sellers of goods. Consumers are presumably protected against any unfairness by the application of the Unfair Contract Terms Act 1977 to non-contractual notices as well as to standard form contract terms.

3.13 In any event, in appropriate cases a public statement by a business that goods or services are available from a particular stock or other source of supply at a stated price may be capable of interpretation as an offer under the rule about the definition of an offer to the public proposed above at question 10. That may be thought a more flexible way of dealing with the issue than a specific rule on the point. We nevertheless ask:

11. In any statutory restatement of the law on formation of contract, should a proposal to supply goods from stock at a stated price made by a business in a public advertisement or a catalogue, or by a display of goods, be treated, unless the circumstances indicate otherwise, as an offer to supply at that price until the stock of goods is exhausted?

12. If so, should a similar rule apply in the case of supply of services?

13. Should any such rule be subject to party autonomy? Or is it preferable to leave the whole matter to the general definition of what may be an offer to the public proposed at question 10?

(ii) When offer effective

CISG (RFC Draft Bill)	**6.** (1) An offer becomes effective when it reaches the offeree. (*CISG Article 15*)
PICC	***2.1.3*** (1) An offer becomes effective when it reaches the offeree.
DCFR and proposed CESL	***I.-1:109 Notice*** and ***Article 10: Notice*** (3) The [offer] becomes effective when it reaches the [offeree], unless it provides for a delayed effect.[18]

3.14 The effect of the general rule on when 'notices' (which include offers) become effective under the DCFR and the proposed CESL is that their rule on when offers become effective is the same as that of the CISG and is thus, as the RFC also stated, in line with present Scots law: that is, an offer becomes effective, in the sense of being available for acceptance, when it 'reaches' the offeree. As discussed above in Chapter 2, the DCFR's 'notices' rule also provides an objective definition of 'reaching' for these purposes (i.e. delivery or making accessible to the offeree), rather than the subjective rule, which would require the offeree to have read the offer or at least be aware of its existence as such.[19] This objective approach is again consistent with Scots law. The best example is *Burnley v Alford.*[20]

[18] This text is in the table above para 2.15 and has been adapted here by replacing "notice" and "addressee" with "offer" and "offeree".
[19] See paras 2.15-2.29, and also PICC Art 2.1.3(1): Vogenauer and Kleinheisterkamp, *PICC Commentary*, p 242.
[20] 1919 2 SLT 123 (OH), discussed above at paras 2.22 and 2.34.

3.15 While the DCFR and the proposed CESL do not need a specific rule on when offers take effect like that in the CISG and the PICC, thanks to their general rule on 'notices', a Scots law enactment on formation of contract would require statements like those in the CISG and the PICC, as well as a definition of 'reaching'. The 'notices' rule could, we think, be adapted for this purpose as well as for the determination of when an acceptance becomes effective as we discuss in the next chapter. We therefore propose:

> **14. In any statutory restatement of the law on formation of contract, there should be a rule that an offer becomes effective when it reaches the offeree.**

(iii) Withdrawal of offer

CISG (RFC Draft Bill)	**6.** (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. (*CISG Article 15*)
PICC	***2.1.3 Withdrawal of offer*** (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.
DCFR and proposed CESL	***I.-1:109 Notice*** and ***Article 10: Notice*** (5) [An offer] has no effect if a revocation of it reaches the [offeree] before or at the same time as the notice.[21]

3.16 Under the CISG and the PICC 'withdrawal' of an offer is to be distinguished from its 'revocation'[22]. The difference is that an offer is 'withdrawn' if it has not yet taken effect as an offer (i.e. reached the offeree), and 'revoked' if it has taken effect by virtue of having reached the offeree.[23] The DCFR and the proposed CESL have the same rule through their provisions on 'notices'.[24]

3.17 Unlike the CISG and the PICC, the DCFR and the proposed CESL do not mention the possibility of the offer being stated to be irrevocable but it would follow from the overall system of 'notice' that an irrevocability provision in an offer would not take effect until it reached the addressee. Thus such an offer could be withdrawn up to and including that point in time.

3.18 Scots law has not addressed this question directly but it would, in principle, reach the same answer. It is established that offers can be terminated without liability unless either

[21] This text is in the table above para 2.15 and has been adapted here by replacing "The notice" and "addressee" with "An offer" and "offeree".
[22] For which see paras 3.20-3.27 below.
[23] See Vogenauer and Kleinheisterkamp, *PICC Commentary*, pp 241 and 245; DCFR, vol 1, pp 114 (Comment F) and 301 (Comment A).
[24] See the table above para 2.15.

declared to be irrevocable in some way (a firm offer) or effectively accepted by the offeree.[25] But even the declaration of irrevocability probably requires objective communication to the offeree to be effective, so if the offeror communicates withdrawal before or at the same time as the declaration it is thought that the courts would find the offeror not bound.

3.19 In the RFC it was thought that the solutions provided by the CISG were satisfactory as well as in line with existing Scots law. The subsequent minimal development of the CISG text by the PICC, the DCFR and the proposed CESL suggest that this conclusion continues to hold good. We therefore propose:

> **15. In any statutory restatement of the law on formation of contract, there should be a rule that an offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.**

(iv) Revocation of offer

CISG (RFC Draft Bill)	**7.** (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. (2) However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. (*CISG Article 16*)
PICC	***2.1.4 Revocation of offer*** (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance. (2) However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.
DCFR	***II.-4:202 Revocation of offer*** (1) An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.

[25] Walker, *Contracts*, para 7.37; SME, vol 15, para 617; McBryde, *Contract*, paras 6.45-6.46 and 6.57; Gloag, *Contract*, pp 35-36. This is the general rule under English law also: Chitty on Contracts, para 2-088.

	(2) An offer made to the public can be revoked by the same means as were used to make the offer. (3) However, a revocation of an offer is ineffective if: (a) the offer indicates that it is irrevocable; (b) the offer states a fixed time for its acceptance; or (c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.
Proposed CESL	***Article 32: Revocation of offer*** 1. An offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance or, in cases of acceptance by conduct, before the contract has been concluded. 2. Where a proposal made to the public is an offer, it can be revoked by the same means as were used to make the offer. 3. A revocation of an offer is ineffective if: (a) the offer indicates that it is irrevocable; (b) the offer states a fixed time period for its acceptance; or (c) it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

3.20 The basic rules stated in the CISG Article 16(1) and (2)(a) (that an offer may be revoked at any time until the completion of acceptance by the offeree unless the offeror has declared it to be irrevocable) are, as the RFC pointed out, consistent with existing Scots law.[26] It is to be noted, however, that under the CISG scheme dispatching an acceptance by post does not immediately conclude the contract, rather, the contract is concluded when the acceptance reaches the offeror.[27] In Scots law, dispatching the acceptance not only precludes any subsequently arriving revocation of the offer from having effect but also concludes the contract.[28] Below we consider whether this latter effect is a good rule, and whether the recommendation of the RFC that it be abolished should be renewed.[29] It is, however, another question whether an offeree who has done everything reasonably possible to effect an acceptance should be protected from the offeror's subsequently arriving revocation. The CISG view, accepted in the RFC and further affirmed by the PICC, the DCFR and the proposed CESL, is that the offeree should indeed be protected in this way.

[26] RFC, paras 3.11 and 3.13.
[27] See further at paras 4.6-4.14 below.
[28] See in particular *Thomson v James* (1855) 18 D 1.
[29] See para 4.13.

3.21 While the DCFR is similar in effect to the CISG on these topics, the DCFR re-jigs the text of the CISG to provide solutions to difficulties discussed in the RFC.[30] The RFC noted that Article 16(1) of THE CISG "does not appear to apply very happily to the situation where an acceptance is not 'dispatched' but is, say, made orally in the presence of the offeror or is indicated by performing an act".[31] The DCFR, followed in this respect by the proposed CESL, deals explicitly with acceptance by conduct and makes it clear that the revocation of an offer prior to such acceptance will also be effective. This was what the RFC thought would be "the appropriate result",[32] and we agree. We therefore propose:

> **16. In any statutory restatement of the law on formation of contract, there should be a rule that an offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.**

3.22 The RFC also noted that the CISG did not deal directly with the revocation of general offers to the public. In part this was perhaps because under the CISG such general offers are normally not offers in the legal sense at all. The RFC suggested that in those cases where a general offer fell to be treated as an offer, the offeror would need to be "careful to provide in the offer for a suitable time limit or terminating event or method of recall... [o]therwise the offer would remain open for acceptance for a reasonable time because it would be practically impossible to ensure that a revocation reached all the potential acceptors".[33] Since in contrast to the CISG the DCFR regards general offers as normally offers, it has to provide an explicit rule on this, which enables offerors to revoke using the same method of communication as was deployed in making the offer in the first place. Since the proposed CESL recognises the possibility that a proposal to the public may be an offer, its text also includes a rule on the revocation of such an offer which is drawn directly from the DCFR one. That rule appears to be a sensible and practical solution to the problem. It is of course a default rule, and it remains open to a party making a general offer to specify time limits or methods of recall.

3.23 We note that, as was the case at the time of the RFC, there appears to be still no authority on this matter in Scots law.[34] Professor McBryde has argued that revoking a general offer in the same way that it was made may not be any more practicable than notifying all possible offerees.[35] We would nevertheless regard this default rule as a useful addition to the rules recommended in the RFC, if only to encourage those making general offers to consider whether or not to include in them express statements about their revocation. Professor McBryde's concern for the offeree who acts in reasonable reliance upon a general offer not having been revoked[36] may be met if, as the CISG, the DCFR and the proposed CESL provide, such an offeree can prevent the offer being revoked.[37] We therefore propose:

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[30] For a detailed critique of the PICC text (and thus also of its CISG forerunner), see Vogenauer and Kleinheisterkamp, *PICC Commentary*, pp 246-257.
[31] RFC, para 3.12.
[32] Ibid.
[33] Ibid.
[34] McBryde, *Contract*, paras 6.58-6.61.
[35] Ibid, para 6.60.
[36] Ibid, para 6.61: "Logic and equity suggest that the offeror should pay for the consequences of actions known to and relied upon by the offeree".
[37] See further paras 3.20-3.21.

17. The rule that an offer made to the public can be revoked by the same means as were used to make the offer should be added to the list of those for adoption in any statutory restatement of the rules on formation of contract.

3.24 A final point of difficulty with the CISG text discussed in the RFC concerns the provisions on when an offer cannot be revoked. The first of these says that an offer cannot be revoked "if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable". The RFC explained that the effect of the CISG formulation was to make the question of whether or not an offer was irrevocable a question of construction of its terms, "bearing in mind that the stating of a fixed time within which an offer is open for acceptance will normally indicate irrevocability".[38] This, it was said, was "essentially the same as the existing law of Scotland", and "a sensible rule".[39] The DCFR (which has been followed in this regard by the proposed CESL) may be thought to offer a slightly different, harder-edged rule: an offer may indicate that it is irrevocable, or state a fixed time for its acceptance, in which case it is irrevocable. It is, however, still a question of construction ultimately whether or not an offer has indicated its irrevocability, or stated a fixed time for its acceptance.

3.25 The DCFR/proposed CESL rule would therefore not necessarily change the outcome of the two Scottish cases described in the RFC and said there to be consistent with the CISG approach. In the first of these, it was held that an offer "made on condition of acceptance within three days" was one which could not be accepted after three days rather than one which was irrevocable within the same period.[40] Likewise in the second case an offer in which it was stated that the contract must be concluded by a particular date and time was held not to be irrevocable.[41] We think that, subject always to whether an offer on its proper construction meets the requirements of irrevocability, the DCFR/proposed CESL formulation of the rule is more direct than that in the CISG and so more readily understood by the reader. We would therefore suggest that, if there is to be a statutory restatement of the law of formation of contract, on this topic the DCFR/proposed CESL rule provides the better model to be followed. We propose accordingly:

18. The rule that an offer may indicate that it is irrevocable, or state a fixed time for its acceptance, in which case it is irrevocable should be added to the list of those for adoption in any statutory restatement of the rules on formation of contract.

3.26 Finally on irrevocability, the CISG text, here followed directly by PICC, the DCFR and the proposed CESL, differs from present Scots law in allowing for the possibility of an offer being irrevocable where it was reasonable for the offeree to rely on the offer being irrevocable and the offeree has acted in reliance upon it. The RFC suggested that a typical case for the application of this rule would be "where the offer itself did not indicate irrevocability but where there was a collateral assurance on which it was reasonable for the offeree to rely."[42] There would have been difficulty under the law as it stood in 1993 – the date of the RFC's publication – in using the law of unilateral promise in this situation,

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[38] RFC, para 3.13.
[39] Ibid. The classic case is *Littlejohn v Hadwen* (1882) 20 SLR 5; see also *Marshall v Blackwood* (1747) Elchies, voce Sale, No 6, and *A & G Paterson v Highland Railway Co* 1927 SC (HL) 32.
[40] *Heys v Kimball and Morton* (1890) 17 R 381 at 384-385.
[41] *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 85 (OH).
[42] RFC, para 3.15.

because such a promise then required proof by the promisor's writ or oath. However, in 1995 RoW(S)A implemented our recommendation for the abolition of the writ or oath rule, replacing it with a rule requiring the constitution of a promise by writing signed by the promisor.[43] There is moreover an exception from the requirement of writing where the promise is made in the course of a business. Thus the only difficulty that would now stand in the way of using the concept of promise in the case figured in the RFC is the question of whether or not the assurance amounted to a promise.[44]

3.27 It might therefore be thought that there was no need in Scots law for a reliance rule like that in the CISG, the PICC, the DCFR and the proposed CESL. However, there is one further scenario upon which we have already touched: that of the general offer. If the DCFR provision on this was followed in any statutory restatement of the law of contract formation, then as a default rule such an offer would generally be revocable in the same way as it was made in the first place. We have already noted Professor McBryde's concern that this could work unfairly in a case where a party had acted in reliance upon the general offer without having any reasonable opportunity to become aware of the offeror's revocation.[45] The reliance rule might give some protection to such a party by making a revocation ineffective so far as that party was concerned. Equally the offeror could make clear in the offer that a right to revoke was retained, thus making offeree reliance on its irrevocability not reasonable. The example makes it clear that in thinking about this specific issue one should consider it in the context of the system of rules as a whole, including their default character. We accordingly ask:

19. Should an offeree's reasonable reliance on the irrevocability of an offer make any subsequent revocation of the offer by the offeror ineffective?

(v) Irrevocable offers and consumer rights of withdrawal

DCFR	***II.-4:202 Revocation of offer*** (4) Paragraph (3)[46] does not apply to an offer if the offeror would have a right under any rule in Books II to IV to withdraw from a contract resulting from its acceptance. The parties may not, to the detriment of the offeror, exclude the application of this rule or derogate from or vary its effects.
Proposed CESL	***Article 40: Right to withdraw*** 4. Where the consumer has made an offer which, if accepted, would lead to the conclusion of a contract from which there would be a right to withdraw under this Chapter, the consumer may withdraw the offer even if it would otherwise be irrevocable.

3.28 The DCFR includes a rule, set out above, in favour of consumers who make an offer which would be treated as irrevocable under its other provisions but where the contract to be made is one from which under yet further provisions the consumer would have a right to

[43] RoW(S)A, ss 1 and 11; and see fn 18 to para 1.11 above.
[44] For an example of difficulties of this kind, see the recent case of *Wylie v Grosset* 2011 SLT 609 (OH).
[45] See para 3.23.
[46] Ie the rule on when an offer is irrevocable: see the table above para 3.20.

withdraw for a certain period after the conclusion of the contract. The most significant of these withdrawal rights occur in distance and off-premises contracts, originate from various consumer protection Directives and so form part of the European acquis.[47] They are accordingly also included in the DCFR (see Book II Chapter 5) and the proposed CESL (see Articles 40-44) as well as in the Consumer Rights Directive of 25 October 2011 which has repealed and replaced the earlier acquis.[48] The proposed CESL, however, includes its provision allowing the consumer who has made an irrevocable offer for a relevant contract to exercise withdrawal rights amongst the rules on that subject. The proposed CESL rule is also stated in far simpler and more direct terms than the corresponding DCFR provision, which is really a savings clause rather than a clear rule, as may be seen from the table above.

3.29 Consumer rights of withdrawal from certain contracts exist in Scots law, largely as a result of the implementation in the United Kingdom of the Directives already referred to.[49] These withdrawal rights generally apply, however, only if a contract is in place, and the legislation in question has nothing equivalent to the DCFR or proposed CESL provisions. In a system such as English law, where even offers stated to be irrevocable are in law revocable unless the offeree has given consideration, there is no problem: the consumer who has only offered can withdraw. But in the present Scots law, where irrevocable offers are binding, a consumer who has made such an offer will have to await either the lapse of the time fixed in the offer or, where that was not the basis upon which the offer was to be regarded as firm, a reasonable time (after which the offer would no longer be open for acceptance[50]), or the conclusion of a contract before any right to withdraw without potential liability or penalty arises. So even in the present law there is a lacuna. We think accordingly that even if there is no legislative restatement of the Scots law on irrevocable offers there is a need to ensure that Scottish consumers are not less well protected than their English counterparts. In our view the proposed CESL rule provides the best model for a Scots law rule to achieve this objective. Since, however, it is a matter of consumer protection, the Scottish Parliament does not have the legislative competence required.[51] The forthcoming 'Consumer Bill of Rights' to be presented in the United Kingdom Parliament in the reasonably near future may provide a suitable legislative opportunity.[52] We therefore propose:

20. A rule like that in Article 40(4) of the proposed CESL should be enacted for the Scots law of contract, regardless of whether or not there is a general legislative restatement of the rules on formation of contract.

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[47] Eg Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, and Directive 97/7/EC on the protection of consumers in respect of distance contracts.
[48] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011.
[49] See the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (SI 1987/2117); Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334); and the Consumer Credit Act 1974, ss 67-74 (see also ss 57-58 on withdrawal from prospective agreements). The Consumer Credit Act 1974 precedes the Directive on credit agreements for consumers [2008] OJ L 133/66, Art 14 of which provides for consumer rights of withdrawal from credit agreements.
[50] See McBryde, *Contract*, paras 6.48-6.52. See further paras 4.16-4.19 below.
[51] See para 1.37 above.
[52] On 19 Sept 2011 the then UK Consumer Minister Edward Davey announced the Government's intention to introduce a Consumer Rights Bill: http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=421254&NewsAreaID=2.

(vi) Rejection of offer

CISG (RFC Draft Bill)	**8.** An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror. (*CISG Article 17*)
PICC	***2.1.5 Rejection of offer*** An offer is terminated when a rejection reaches the offeror.
DCFR	***II.-4:203 Rejection of offer*** When a rejection of an offer reaches the offeror, the offer lapses.
Proposed CESL	***Article 33: Rejection of offer*** When a rejection of an offer reaches the offeror, the offer lapses.

3.30 The DCFR and the proposed CESL are the same as the CISG on the subject of the rejection of an offer except that, like the PICC, they omit the latter's phrase, "even if it is irrevocable". This is presumably on the grounds of redundancy. Scots law is to the same effect: and even the irrevocable offer falls when it is rejected.[53] The RFC thought that the rule was "clear, sensible and unsurprising" and "could be adopted without difficulty".[54]

3.31 We continue to hold that view. It is important to note, however, that the CISG, the DCFR and the proposed CESL are here dealing only with outright rejection or refusal of an offer by an offeree. As the RFC noted, an offer can terminate in other ways under the CISG: for example, on the expiry of any time limit set in the offer, or in the absence of a time limit, on the expiry of a reasonable time.[55] To that may be added the 'modified' or 'qualified' acceptance where the offeree purports to accept while at the same time adding new or different terms which materially alter the offer, which under Article 19(1) CISG constitutes a rejection of the offer and a new counter-offer open for acceptance by the original offeror. All these rules, which have their counterparts in the PICC, the DCFR and the proposed CESL's revision of the latter, will be dealt with in more detail later.[56] Here we merely propose:

21. In any statutory restatement of the law on formation of contract, there should be a general rule that when a rejection of an offer reaches the offeror, the offer lapses.

[53] *Wolf & Wolf v Forfar Potato Co* 1984 SLT 100 (IH); *Rutterford Ltd v Allied Breweries Ltd* 1990 SLT 249 (OH). It should be noted that both these cases concerned "qualified acceptances" rather than outright rejections of offers, but there can be no doubt that the same principle would apply to an outright rejection: McBryde, *Contract*, para 6.37, citing *Lawrence v Knight* 1972 SC 26 (OH) and *Tenbey v Stolt Comex Seaway Ltd* 2001 SC 638 (OH); also Walker, *Contracts*, para 7.37; SME, vol 15, para 655. Gloag does not appear to discuss the point.
[54] RFC, para 3.15.
[55] RFC, para 3.16 citing CISG Art 19(2); see further paras 4.16-4.19 below.
[56] See paras 4.21-4.30.

Other issues about offers: material change of circumstances, death and insanity

3.32 The RFC noted that there were some grounds on which an offer could lapse in Scots law which were not replicated in the CISG rules. In particular an offer may terminate on a material change of circumstances,[57] or on the supervening death or mental illness of the offeror.[58] The RFC suggested that the CISG rule was not to be taken as the only way in which an offer might fall and that, if adopted into a statutory statement of Scots law, other possibilities would continue to apply.[59] Our present view is that if there is to be such a statutory statement it should be as complete as possible, so that there should be provisions on material change of circumstances and death or mental illness of the offeror if these are desirable rules.

3.33 We note that such rules have not found their way into either PICC, the DCFR or the proposed CESL.[60] Perhaps their requirements of good faith would cover the particular case of material change of circumstances during the offer-acceptance process.[61] In Scots law, however, where good faith is generally an underlying principle rather than an active source of entitlements in contract law, specific rules seem to provide a better approach. On material change of circumstances, the present rule is stated as follows by Lord President Inglis: "when an offer is made without a limit of time being stated within which it must be accepted, it may become inoperative by reason of any important change of circumstances, without any formal withdrawal of the offer being made."[62] The change of circumstances must be such as to make the offer "utterly unsuitable and absurd".[63] Professor McBryde notes several cases, many of them involving the lapsing of tenders in delict claims where either the amount to be awarded by the court had become apparent in some way, or where the pursuer had died.[64] We think that such cases would continue to be a useful guide as to the scope of 'material' change of circumstances rendering an offer ineffective, and that any legislative statement of the rule should not go beyond a fairly simple formulation of the principle as stated by Lord President Inglis. So far as we know, that statement of the law is uncontroversial. We note too that the rule will be a default one and that it will be open to offerors to spell out in their

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[57] See in particular *Macrae v Edinburgh Street Tramways Co* (1885) 13 R 265 (IH); *Bright (Richardson's Exr) v Low* 1940 SC 280 (IH); *Sommerville v National Coal Board* 1963 SC 666 (IH); *Lawrence v Knight* 1972 SC 26 (OH); McBryde, *Contract*, paras 6.62-6.64.
[58] McBryde, *Contract*, paras 6.66-6.70. Offers may also be no longer available for acceptance after the lapse of a reasonable time: see paras 4.16-4.19 below.
[59] RFC, para 3.16.
[60] For PICC comments on this, see Vogenauer and Kleinheisterkamp, *PICC Commentary*, p 260.
[61] For the DCFR duty of good faith between parties negotiating a contract and more generally see its Arts II.-3:301(2) and I.-1:103 respectively. There is a parallel structure in PICC which imposes liability for losses on parties who negotiate or terminate negotiations in bad faith (Art 2.1.15) and provides that "[e]ach party must act in accordance with good faith and fair dealing in international trade" (Art 1.7(1)). The proposed CESL imposes a general and non-excludable duty of good faith and fair dealing at Art 2 which manifests itself in various specific rules, eg Arts 23 (Duty to disclose information about goods and related services), 83 (Meaning of "unfair" in contracts between a trader and a consumer), 86 (Meaning of "unfair" in contracts between traders) etc. CISG Art 7(1) is famously vague on good faith, providing that interpretation of CISG should promote "the observance of good faith in international trade". The DCFR (III.-1:110) and the proposed CESL (Art 89) do empower a court to vary or terminate an obligation the performance of which has become so onerous through an exceptional change of circumstances as to make it manifestly unjust to hold the debtor to the obligation; but there must first be an obligation and the change of circumstances must occur after the obligation has been incurred. Thus this rule is inapplicable to parties in negotiation towards a contract. The same holds good for PICC rules on Hardship (Arts 6.2.1-6.2.3). The Inner House has recently observed that there is "as yet, no foundation for [a doctrine of equitable adjustment of contracts], as a generality, in Scots law": *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* [2011] CSIH 87, para 29.
[62] *Macrae v Edinburgh Street Tramways Co* (1885) 13 R 265 at 269.
[63] Ibid.
[64] McBryde, *Contract*, paras 6.63-6.64.

offers the specific circumstances in which they will cease to be available for acceptance. Professor McBryde gives the example of an offer for all the shares of a company which will lapse unless a given percentage of the shareholders accept within a given period of time. We therefore ask:

> **22. Should there continue to be a rule that offers lapse upon a material change of circumstances? If so we propose that it should be included in any statutory restatement of the Scots law on formation of contract.**

3.34 The effect of the offeror's death or supervening mental illness or disorder after making the offer but before it is accepted, or of the offeree's death or supervening mental illness or disorder after dispatching an acceptance but before it reaches the offeror, is not firmly settled in Scots law. In some cases the situation may come within the 'material change of circumstances' rubric.[65] Where there is *delectus personae* on either side, the death of the one 'chosen' would probably affect either an offer addressed to or an inchoate acceptance made by that person. Professor Gloag took the wider view that "an offer falls by the death of either party before acceptance".[66] Professor McBryde is more cautious, but suggests that Scots law adopts a subjective approach toward questions of capacity to contract, and that a person who dies or becomes mentally ill thereby loses the necessary capacity to conclude any contract.[67] The reasoning is equally applicable to offeror and offeree.[68] It should be noted that in English law, cases of *delectus personae* apart, offers in at least some circumstances are capable of acceptance after the offeror's death where the acceptor is ignorant of the death at the relevant time.[69] It is also submitted in *Chitty on Contracts* that, in the absence of *delectus personae*, the death of the offeree before acceptance leads, not to automatic termination of the offer, but to the question whether "on its true construction [it might] be held to have been made to the offeree or to his executors, and that such an offer could be accepted after the death of the original offeree."[70]

3.35 The RFC argued that the CISG implicitly recognised a rule that an offer cannot be accepted after the death of either party, in terms that can also be applied to the DCFR and the proposed CESL:

> "An acceptance could not, it is thought, be said to 'reach' an offeror who had already died. It is true that … an acceptance 'reaches' an offeror when it is delivered to 'his place of business or mailing address.' However, once an offeror has died it is no longer 'his' place of business or mailing address. It is a deceased offeror's former place of business or mailing address. Similarly the Convention seems to envisage

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[65] As in *Sommerville v National Coal Board* 1963 SC 666 (IH) (where the offeree died prior to accepting a tender).
[66] Gloag, *Contract*, p 37. See also Gloag & Henderson, para 5.18, and *Glasgow City Council v Peart* 1999 Hous LR 117, 1999 GWD 29-1390 (OH), where an agent's authority to sign an acceptance was held to lapse on the death of its principal.
[67] A problem which the Scottish books do not address is that of the irrevocable offer, which binds the offeror even before acceptance (see paras 3.20-3.29 above), and may therefore continue to bind the offeror's estate after death. Cf Chitty on Contracts, para 2.099, noting that in English law an offer does not fall where a person has validly *contracted* not to revoke it for a fixed period but dies during the period of the offer.
[68] McBryde, *Contract*, paras 6.66-6.70. See also paras 26.16-26.19, where Professor McBryde discusses the effect of death upon delivery of deeds. It is another question again what happens when death or mental illness of either party intervenes after the contract has been concluded: see the discussion at paras 26.01-26.15.
[69] Chitty on Contracts, para 2.100. The main authorities concern continuing guarantees (eg of bank overdrafts), which are said to be divisible and continuing offers accepted from time to time as the bank makes further loans to its customers. These guarantees clearly survive the guarantor's death with regard to loans made before that event but it is thought that, in Scots law, such guarantees are conditional unilateral obligations in their own right (ie promises to pay upon the default of the borrower) and so bind the estate of the guarantor on that basis.
[70] Chitty on Contracts, para 2.101.

> only acceptance by 'the offeree'. An offeree who had already died could not indicate assent. Suppose, however, that an offeree posts an acceptance and then dies while it is in the post. Is a valid contract concluded when the acceptance reaches the offeror? It is thought not. There could be no valid contract if, at the moment of conclusion, there was in fact only one party. If legal incapacity at the moment of conclusion of contract would be a ground of invalidity, and the Convention does not prevent that, then it seems clear that death would be too. Death is the ultimate incapacity."[71]

The RFC went on to argue that the CISG also did not preclude reliance on incapacity through mental disorder or illness.[72]

3.36 We agree that death is the ultimate incapacity, and should have the effects of terminating any offer made by the deceased and preventing the possibility of any effective acceptance after the death of the offeror or between the death of the offeree and the moment that the acceptance reaches the offeror. This, like all the rules discussed in this chapter, is a default rule and so can be varied by the terms in which the offer is made. In essence this is not very different from the English rule, but has the advantage, we think, of providing some baseline certainty in the law. It does not change the rule that contracts and other obligations, as distinct from offers, generally continue to bind the estates of parties to such obligations who happen to die during their currency.

3.37 The position where a party is suffering from mental illness seems to us potentially more difficult given first the variety of forms that mental illness may take. As Professor McBryde remarks, "[n]ot all mental or psychiatric disorders will affect capacity to contract."[73] The incapacity arises where the person's condition gives rise to an inability to consent to the particular transaction.[74] But a person's mental condition may fluctuate, for example in cases of manic depression or incipient dementia, and it may be a difficult question whether or not at the time an offer or acceptance was made the party was capable in the manner required by law. It may be that a party's capacity is sufficient to cover relatively simple transactions but not ones of greater complexity.[75] We note too that the concept of incapacity under the Adults with Incapacity (Scotland) Act 2000 covers not only mental disorder (which, however, extends beyond mental illness to cover learning disabilities and personality disorders), but also physical disabilities, any of which render the adult incapable of acting, of making, communicating, understanding, or retaining memory of decisions. The granting of powers of attorney, intervention orders by a court, or the appointment of a guardian under the 2000 Act may take care of many of the potential problems in this area.[76] But the common law of incapacity continues to govern the position of a person who has no attorney, intervention order, or guardian in place at the time he or she makes an offer or sends an acceptance.[77]

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[71] RFC, para 4.10.
[72] RFC, para 4.12, citing CISG Art 4.
[73] McBryde, *Contract*, para 3.36 (noting, eg, that paedophilia is strictly a psychiatric disorder but not one that affects capacity to contract).
[74] Ibid, para 6.66.
[75] Note too the Age of Legal Capacity (Scotland) Act 1991, s 2(1), under which a child under the age of 16 may enter a legal transaction provided (a) the transaction is of a kind commonly entered into by persons of the child's age and circumstances, and (b) the transaction is one the terms of which are not unreasonable. There could be consideration of whether and how far these criteria might be extended to adults with incapacity.
[76] A guardianship order renders the adult concerned incapable of entering into any transaction in relation to a matter within the scope of the guardian's authority, unless authorised by the guardian: Adults with Incapacity (Scotland) Act 2000, s 67.
[77] The rules on facility and circumvention and undue influence as grounds of challenge to what appears to be a concluded contract may continue to be of particular relevance in this context. See our joint Consultation Paper

The crucial benefit that the common law can offer in such circumstances is that what may appear to be a contract binding the incapable person is no such thing; the incapacity during the process of formation means that a contract never was completed. The outstanding problem may be the limits upon what the common law will recognise as incapacity. It is beyond the scope of the present exercise to investigate or propose the extension of the common law of capacity in such circumstances to cover the forms of incapacity recognised in the 2000 Act, although we note Professor McBryde's observation that some physical problems could be relevant such as the physical trauma that leaves a party in a coma.[78]

3.38 We think that it would be helpful for any legislation on the formation of contract to clarify the law in this area. While such legislation might refer specifically to the death of either party as a ground upon which an offer or an acceptance might fall or fail, it would be inappropriate for it to use the traditional term of 'insanity' as a further ground for that result. Nor would it be appropriate to substitute 'mental illness' or 'mental disorder' for 'insanity', since that may be at once too expansive and too restrictive. We believe that it would be simpler to adopt the expedient of referring to "death or other loss of capacity", at least in terms of defining the policy which should be followed. This would allow for the further development of the law of capacity to contract in the future, whether by further legislation or by judicial decision. We would therefore propose:

> **23. In any statutory restatement of the law on formation of contract, it should be provided that an offer should cease to be capable of acceptance as a result of the death or loss of capacity of either party before the conclusion of the contract.**

Effect of insolvency of the offeror or offeree

3.39 The RFC recommended against any change to what it took to be the present law that an offer does not lapse merely because one of the parties becomes insolvent before the contract is concluded.[79] There may, however, be some doubt as to whether this is in fact the law, given the statement in Bell's *Principles* that "[t]he provisional engagement of an offer may become ineffectual by the … bankruptcy [of the offeror] before acceptance."[80] Gloag, however, merely reports this statement by Bell without further comment,[81] but in the *Stair Memorial Encyclopaedia* it is noted that there appear to have been no cases on the matter, and then argued that:

> "at least where the resulting contract would place upon the bankrupt party an obligation to pay, the offer should cease to be open for acceptance on that party's supervening apparent insolvency, whether he be offeror or offeree. The solvent party should not be bound by an acceptance made to him by a bankrupt offeree, nor be

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with the Law Commission of England & Wales on Consumer Redress for Misleading and Aggressive Practices (Law Com No 199, 2011; Scot Law Com No 149, 2011), esp at Pt 7.

[78] McBryde, *Contract*, para 6.66, fn 200. The person rendered semi-comatose by a physical trauma may be an even more pertinent example: consider the condition of the plaintiff in *Kaye v Robertson* [1991] FSR 62 (CA).

[79] RFC, para 4.13.

[80] Bell, *Principles*, para 79. The passage is found not only in the 10th and final edition but also in the 4th, the last published in Bell's lifetime; so it cannot be dismissed as an intrusion by Bell's later editors, even though it is not entirely compatible with a general comment on the effects of insolvency in Bell, *Commentaries*, I, 265 (quoted in para 3.40).

[81] Gloag, *Contract*, p 37. Gloag & Henderson, para 5.18, states that an offer lapses upon the offeror's bankruptcy.

bound by an acceptance made by him to an offeror who unknown to him has become bankrupt after making the offer."[82]

3.40 Walker, however, is of a different view: "If a person having made an offer becomes insolvent the offer, it is thought, does not lapse." But he goes on to suggest that "an insolvent cannot validly accept."[83] McBryde does not discuss directly whether offers lapse on the supervening insolvency or bankruptcy of either the offeror or the offeree but observes that "[i]nsolvency does not by itself prevent a person entering into contracts."[84] To explain this, he goes on to quote a still telling passage from Bell's *Commentaries*:

> "The most flourishing and successful merchants are exposed to accidental losses, which may for a moment make them insolvent on the face of their books; but they still go on in full credit; and if no other misfortunes overtake them, proceed in the fair road to affluence. If a merchant, whatever might be his prospects or resources, were obliged, the instant that his ledger presented to him the view of insolvency, to relinquish his trade, and call his creditors together, the general trading interest would suffer; but most especially his individual creditors would feel the loss. A merchant's capital is in continual fluctuation; and an interruption to his trade, in consequence of every such threatened danger, would prove a death-blow to all the speculations in which he might have embarked his capital, and his funds would be recalled before the regular profits which were to redeem him from insolvency could return."[85]

3.41 We think on this basis as well as for the reasons which the RFC itself clearly sets out that its recommendation continues to be sound. As the RFC explains:

> "[T]he Bankruptcy (Scotland) Act 1985 envisages that a person may enter into contracts right up to the date of sequestration and that the permanent trustee may adopt any such contract where adoption would be beneficial to the administration of the debtor's estate (unless adoption is precluded by the express or implied terms of the contract) or may refuse to adopt any such contract. Many businesses continue trading after insolvency, and some manage to trade their way out of insolvency. We think that it would be dangerous to have any rule that an offer lapsed on, say, the apparent insolvency of either party. In some cases an offer or acceptance may contain an express or implied condition as to the continued solvency of the other party but this would be a question of provision or interpretation, not a rule of law. The legal effect of actual sequestration or winding up on a contract by the bankrupt or company after that date … would continue to be governed by the existing law."[86]

3.42 Our view therefore is that the default rule should be that insolvency (whether apparent, practical or absolute[87]) of either offeror or offeree prior to the completion of the latter's acceptance has no effect on either offer or acceptance. We note that it will remain

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[82] SME, vol 15, para 653. A similar argument was advanced in SLC Memorandum No 36 Constitution and Proof of Voluntary Obligations: Formation of Contract (1977), para 64; see fn 22 to para 1.12 above.
[83] Walker, *Contracts*, para 7.30.
[84] McBryde, *Contract*, para 26.21. See also McBryde, *Bankruptcy* (2nd edn, 1995), para 1.39.
[85] Bell, *Commentaries*, I, 265 (quoted in McBryde, *Contract*, para 26.21).
[86] RFC, para 4.13. The underlying rules on the effect of insolvency on a contract remain the same as at the time of the RFC, viz that in the absence of contrary provision the parties continue to be bound but the insolvency officer may decline to adopt it leaving the creditor to its claim of damages for breach of contract for which it may rank in the insolvency process: McBryde, *Contract*, paras 26.25-26.30. McBryde, *Bankruptcy* (2nd edn, 1995), paras 9.99-9.103, and Gloag & Henderson, para 50.30, are other succinct statements of the principles but for personal bankruptcy only. For corporate insolvency see J St Clair and J Drummond Young, *The Law of Corporate Insolvency in Scotland* (4th edn, 2011), para 4.07.
[87] Absolute insolvency occurs when persons' assets are exceeded by their liabilities; apparent or practical insolvency when persons are not paying their debts as they fall due, or have given their creditors notice that they will not do so.

possible under our suggested restatement or reformulation of the law on formation of contract for a party to safeguard its position by writing an express condition of the continued solvency of the other party into an offer or acceptance. In view of the lack of authority on this question, and the varying views about it found in standard works on contract law, we ask:

> **24. Should it be enacted for the avoidance of doubt that the apparent or practical insolvency of either an offeror or an offeree prior to the acceptance of an offer has no effect upon the existence or effectiveness of the offer or any acceptance thereof, subject to any provision to the contrary by the parties, express or implied?**

Delayed offer

3.43 A final question not mentioned in the RFC or in any of the instruments surveyed for the purposes of this Discussion Paper is the offer that is delayed in its transmission to the offeree. The scenario is one where the offer states a time limit within which an acceptance must be completed but does not reach the offeree until after the time limit expires. A typical case might be one where the offer is posted but held up in the mail; another might be the emailed offer which suffers from network delays. In these cases the delay is generally not the offeror's fault, unless the communication is sent at a time when the system is generally known to be likely to suffer problems – for example, when a postal workers' strike is imminent. But delay may also be caused by the offeror having misaddressed the offer, for example by sending a letter to a previous address of the offeree's, or by putting the wrong house/flat number or street name (for example, "Acacia Way" for "Acacia Avenue"). Emails can also be misaddressed, and while frequently that will lead to the sender receiving immediate notification of a failed transmission, it can also be that the address used is one that, although still technically available, the recipient has given notice is no longer in regular use. But the offeror may remain unaware of the difficulty because, for example, the address used was pulled from an electronic address book or the email address field was populated automatically when the email was being composed.

3.44 The US Restatement (2d) Contracts provides that the offeree "who knows or has reason to know of the delay"[88] cannot accept, even if the delay is due to the fault of the offeror. Furmston & Tolhurst suggest that "[s]ince a delay is normally apparent from the date of the letter or its postmark, in these circumstances the offeree will know or have reason to know of the delay and cannot accept the offer."[89] The same holds true for emails. But, the Restatement continues, "if the delay is due to the fault of the offeror or to the means of transmission adopted by him, and the offeree neither knows nor has reason to know that there has been delay", the time within which the offeree can accept is extended by the delay. It is difficult to figure a case for the application of this rule other than one where the time-limit is stated in very imprecise terms (for example, "by the end of today/this week/this month") but the offeror's communication itself remains completely undateable: for instance, an

[88] At Section 49.
[89] Furmston and Tolhurst, *Contract Formation*, para 3.13 (citing, at fn 28, the case of *Chesebrough v Western Union Telegraph Co* 76 Misc 516, 135 NY Supp 583 (1912) affirmed 157 App Div 914, 142 NY Supp 1112 (1913), which, however, is about an acceptance telegram, rather than an offer, being delayed in transmission but held nonetheless, in an application of the postal acceptance rule, to be effective).

undated letter which is either hand-delivered at a point in time unknown to the offeree or posted but with a postmark on its envelope too faint or blurred to be legible.

3.45 We are uncertain as to the regularity with which this potential problem occurs, and we would welcome information from any consultees who may have had relevant experience about whether any difficulties have arisen in consequence. We think that the first leg of Section 49 of the Restatement is undoubtedly the rule which the Scottish courts would develop should a relevant case come before them, and we have no hesitation in recommending the enactment of such a rule should it be thought useful to have it. We are less clear whether there really is a need for a rule like that in the second leg of Section 49, since the number of cases in which it might be applied must, we think, be very few. We therefore ask:

25. a) Should any statutory restatement of the rules on formation of contract include rules on the application of time limits contained in offers which have been delayed in their transmission to the intended recipients?

b) To what extent are the rules in Section 49 of the US Restatement (2d) Contracts a model to be followed in this regard?

Chapter 4 The Acceptance

Introduction

4.1 This chapter discusses the acceptance side of the contract formation process. In the international texts forming the basis of our contract law review as in Scots law itself, only when an offer is properly accepted is a contract formed. This seemingly simple statement masks a number of difficult questions with which the law has to deal. Whether present Scots law provides satisfactory answers is perhaps open to doubt in some respects. The issues to be addressed in this chapter are: (i) definition; (ii) time of conclusion of contract (including postal acceptances); (iii) acceptance by uncommunicated acts; (iv) time limits; (v) calculating the time for acceptance; (vi) modified acceptances; (vii) late acceptances; (viii) withdrawal of acceptance. With the exception of matters falling under (ii) and (vi), the existing Scots rules are very similar to those in the CISG, DCFR and proposed CESL.

(i) Acceptance

CISG (RFC Draft Bill)	**9.** (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance. (*CISG Article 18*)
PICC	***2.1.6 Mode of acceptance*** (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
DCFR	***II.-4:204 Acceptance*** (1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer. (2) Silence or inactivity does not in itself amount to acceptance.
Proposed CESL	***Article 34: Acceptance*** 1. Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer. 2. Silence or inactivity does not in itself constitute acceptance.

4.2 The definition of acceptance in the DCFR and the proposed CESL is much as in the CISG and the PICC. It is consistent with present Scots law.[1] The rule would, if adopted in Scots law, remove any doubt there may be as to whether a third party who is not a named offeree's agent can accept an offer – as for example when a party purchases the business of an offeree during the currency of an offer and then attempts to accept it.[2] The rule's application is also illustrated in the recent case of *Fleming Buildings Ltd v Forrest*,[3] where the defenders attempted to accept in the name of their company a building tender made to them personally and it was held that there was no contract. It would also seem that if an offer is made to two or more persons jointly a contract is only formed when all accept.[4]

4.3 The rule would also mean that conduct ostensibly fulfilling the requirements of acceptance of a general offer, i.e. an offer to the public, but which was carried out in ignorance of the offer, would not conclude a contract.[5] Furthermore, the rule would confirm the position that where parties make each other offers whose terms are identical in substance and which then cross each other *en route* to their respective recipients, no contract is formed.[6]

4.4 The rule on silence or inactivity as not being acceptance is not stated absolutely, and this leaves room for the exceptional case where there may be a course of dealing or usage between parties such that silence or inactivity in response to an offer is treated by them as concluding a contract.[7] The RFC also noted that the over-arching party autonomy principle means that an offeror may stipulate what will constitute acceptance, either going further than the rule in adding to its requirements – for example, that an acceptance be in writing or through a particular form of conduct; or in subtracting from them – for example by providing that no statement of assent is needed to bind the offeror.[8] The rule continues to appear to us a sensible and concisely stated one which, while consistent with Scots law, could also clarify some currently doubtful or uncertain points on which there is no direct Scottish precedent. It would therefore form a useful part of any statutory restatement of the law on formation of contract.

4.5 In the event of a statutory restatement of the Scots law on formation of contract, a definition of acceptance would be needed, probably going along with a sub-rule explaining that generally silence or inactivity cannot amount to acceptance. Such rules would of course be subject to party autonomy in determining what constitutes acceptance of an offer. We accordingly propose:

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[1] McBryde, *Contract*, paras 6.71-6.91. For recent examples of acceptance of a written offer by the offeree's conduct see *Langstane Housing Association Ltd v Riverside Construction (Aberdeen) Ltd* 2009 SCLR 639 (OH) and *Prosper Properties v Bell*, Dumfries Sheriff Court, 26 March 2008, unreported.

[2] The example is drawn from the English case of *Boulton v Jones* (1857) 2 Hurl & N 564, discussed in McBryde, *Contract*, para 6.107. McBryde suggests that an offer to a named person cannot be assigned by the offeree without the offeror's consent (para 6.106). The problem does not arise with general offers where anyone may accept.

[3] [2010] CSIH 8; 2010 GWD 13-234.

[4] See *Glasgow City Council v Peart* 1999 Hous LR 117; 1999 GWD 29-1390 (OH).

[5] See our Memorandum No 36, Constitution and Proof of Voluntary Obligations: Formation of Contract (1977), para 27, available at http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/1970-1979/; see also McBryde, *Contract*, paras 6.33 and 6.75. The position is different if the statement is a unilateral promise.

[6] See our Memorandum No 36 (cited in fn above), para 28. And see *Tinn v Hoffmann & Co* (1873) 29 LT 271.

[7] McBryde, *Contract*, para 6.81, citing the English case *Rust v Abbey Life Insurance Co Ltd* [1979] 2 Lloyd's Rep 334, which was approved in the repudiation case *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800 at 812 (Lord Steyn).

[8] RFC, para 4.3.

26. **A rule that any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer should be included in any statutory restatement of the law on formation of contract, along with a further rule that silence or inactivity by the offeree does not normally indicate acceptance.**

(ii) Time of conclusion of contract

CISG (RFC Draft Bill)	**9.** (2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. … (*CISG Article 18*)
PICC	***2.1.6 Mode of acceptance*** (2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror.
DCFR	***II.-4:205 Time of conclusion of the contract*** (1) If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror. (2) In the case of acceptance by conduct, the contract is concluded when notice of the conduct reaches the offeror.
Proposed CESL	***Article 35: Time of conclusion of the contract*** 1. Where an acceptance is sent by the offeree the contract is concluded when the acceptance reaches the offeror. 2. Where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror. 3. Notwithstanding paragraph 2, where by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by conduct without notice to the offeror, the contract is concluded when the offeree begins to act.

4.6 The basic rule in the CISG (and, following it, the PICC) – that an acceptance concludes a contract when it reaches the offeror – is not quite emulated in the DCFR, which confines itself respectively to the case where the acceptance is "dispatched". This suggests that the principle set out is not necessarily applicable to, for example, situations where the parties are dealing face-to-face or on the telephone.[9] The proposed CESL replaces "dispatched" with the simpler "sent", but its formulation seems to have the same implication of non-application except between parties operating from different places.

4.7 In Scots law, in general, a contract can only be concluded when the acceptance is received by the offeror. An element of communication, objectively determined as discussed

[9] See the comments in DCFR, vol 1, p 314 (Comment B).

in Chapter 3, is thus required to make any acceptance effective. We think, like our predecessors in the RFC, that there should be a single general rule or principle on when acceptances become effective, whether between parties who are face-to-face or who are distant from each other.[10] As between the texts set out above, we feel that the CISG/PICC version is to be preferred because it clearly covers all situations, including those where distant parties are nonetheless in virtually instantaneous communication with each other, such as on the telephone. It better reflects the general position at present in Scots law.[11] Were there to be a statutory restatement of the law on formation of contract, therefore, we would suggest that this general rule on when an acceptance becomes effective and concludes a contract should be expressed in a way similar to Article 18 of the CISG. We ask:

27. Do consultees agree that the general rule on when an acceptance becomes effective and concludes a contract should be when the indication of assent reaches the offeror?

Postal acceptances

4.8 One major exception to the general principle in Scots law that acceptance, like other statements intended to have some legal effect, must be communicated to the person to be affected by it, is the 'postal acceptance rule'. Received from English law in the mid-nineteenth century, this rule applies where the parties reasonably contemplate that the post may be used for transmission of an acceptance to the offeror (it is not necessary that the preceding offer be sent through the postal system).[12] Under the exception, an unqualified acceptance takes effect when the acceptance is posted, rather than when it reaches the offeror.[13] The rule only applies to acceptances: postal offers, withdrawals of offers and qualified acceptances do not benefit from the postal acceptance rule, and they only become counter offers when actually communicated. So recently, for example, it has been held not to apply to a notice that a contractual break option was to be exercised.[14]

4.9 The rationale for the rule is essentially that the offeror, having initiated the transaction and in doing so having use of the postal service in its contemplation, should bear the risks inherent in the period of time between the posting of the acceptance and its arrival with the offeror, while the offeree may rely on having a contract after doing all in its power to conclude one. The offeree may also benefit from a presumption that a letter which has been posted has also been received.[15] The rule applied to telegrams but not to forms of communication taken to be effectively instantaneous, such as telexes and telephones. Likewise, faxes of missives have been held not to have the benefit of the postal acceptance rule because physical delivery of the written documents is required and facsimiles are only copies.[16] It has been disputed, but not so far decided in either the Scottish or the English

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[10] RFC, para 4.4: "The law would be much more coherent if there were only one rule for all means of communicating an acceptance."
[11] McBryde, *Contract*, para 6.109: "The general rule is that an acceptance must be communicated to the offeror."
[12] McBryde, *Contract*, para 6.118(3). The foundational English case is *Adams v Lindsell* (1818) 1 B & Ald 681.
[13] *Thomson v James* (1855) 18 D 1; *Dunlop Wilson & Co v Higgins & Son* (1848) 6 Bell 195; *Jacobsen, Sons & Co v Underwood & Son Ltd* (1894) 21 R 654.
[14] *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139, 2008 GWD 33-494. This case is discussed at paras 2.24-2.25 above.
[15] *Chaplin v Caledonian Land Properties* 1997 SLT 384. See comments on this point in McBryde, *Contract*, para 6.116, fn 345.
[16] *Park, Petrs* 2009 SLT 871 (OH); cf *McIntosh v Alam* 1998 SLT (Sh Ct) 19.

courts, whether the rule applies to emailed acceptances of offers.[17] It seems clear that the rule does not generally apply to orders placed by consumers by way of automated e-commerce websites, since if the website is only an invitation to treat, orders cannot be acceptances by which the contract is concluded. The acceptance must come from the supplier.[18]

4.10 The postal acceptance rule can give rise to some well-known difficulties if taken to its logical conclusions. In the English decision of *Household Fire Insurance Co v Grant*[19] it was held that even if a posted acceptance never reaches the intended party a contract will be concluded despite the offeror's ignorance of its obligations. Doubt remains on whether this proposition holds good in Scots law also, there being several judicial dicta against it from the nineteenth century down to the present.[20] It has, however, been held in Scotland that an acceptance posted within a time limit set by an offer but arriving with the offeror after the limit's expiry nonetheless concluded a contract between the parties.[21] We understand that in the light of this state of the law it is conventional for formal offers of a contract to stipulate that to be effective acceptances must reach the offeror; the courts will give effect to such provisions.[22]

4.11 An important function performed by the postal acceptance rule is the protection of the offeree from revocation by the offeror once the acceptance is posted. Since the offeror's revocation can only take effect upon arrival at the offeree's place, any acceptance posted before that event renders the revocation of the offer ineffective, because a contract already exists from which the offeror cannot unilaterally withdraw.[23] On the other hand, on one possible view of the old case of *Countess of Dunmore v Alexander*, acceptances once posted can in any event be revoked, so long as the revocation reaches the offeror before or at the same time as the acceptance.[24] While this result seems to go against the logic of the postal acceptance rule, it may confirm that the underlying policy of Scots law in this area is the protection of the offeree's interests ahead of those of the offeror; and certainly in the suggested scenario it is hard to see that the offeror suffers any prejudice in the result.

4.12 The postal acceptance rule took shape in a world where the relatively newly developed postal system provided the only means of communication between distant parties.[25] The position in the twenty-first century is (and indeed was for much of the

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[17] See eg Donal Nolan, "Offer and acceptance in the electronic age" in Burrows and Peel*, Contract Formation*, pp 70-79; Christine Riefa and Julia Hörnle, "The changing face of electronic consumer contracts in the twenty-first century: Fit for purpose?" in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (3rd edn, 2009), pp 103-106.
[18] See Nolan and Riefa/Hörnle, in the articles cited in the fn above, at pp 79-86 and pp 106-109 respectively.
[19] (1878-79) LR 4 Ex D 216 (CA). See also *J M Smith Ltd v Colquhoun's Tr* (1901) 3 F 981 (IH).
[20] See McBryde, *Contract*, para 6.115; *Sloans Dairies v Glasgow Corp* 1977 SC 223 (IH); *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139; and *Park, Petrs* 2009 SLT 871 (OH).
[21] *Jacobsen, Sons & Co v Underwood & Son Ltd* (1894) 21 R 654.
[22] For an example see the Property Standardisation Group pro forma "Offer to Sell - Vacant Possession" (v6), clause 23, available at: http://www.psglegal.co.uk/. In *Holwell Securities v Hughes* [1974] 1 WLR 155, the English Court of Appeal held that the postal acceptance rule can only take effect where the terms of the offer allow for the displacement of the need for actual communication. An offer that requires "notice in writing to the intending vendor" does not accommodate the postal acceptance rule.
[23] *Thomson v James* (1855) 18 D 1.
[24] *Countess of Dunmore v Alexander* (1830) 9 S 190. Other views of the case are possible: see eg Gloag, *Contract*, p 38.
[25] On the development of the postal system in the eighteenth and early nineteenth centuries in Scotland, see A R B Haldane, *Three Centuries of Scottish Posts: an historical survey to 1836* (1971). The telegram system developed in the nineteenth century (see Tom Standage, *The Victorian Internet: The Remarkable Story of the Telegraph and the Nineteenth Century's Online Pioneers* (1998)), but in England the postal acceptance rule was

twentieth) completely different, with a wide range of alternative means of communication available. While it remains common to use posted letters in business practice, copies of such documents will often first be faxed to their intended recipient or sent as attachments to emails. The documents themselves may really be formal confirmations of earlier telephone conversations and less formal email exchanges. Letters can be readily overtaken by faster means of communication. In this context, the idea that one or other of distant negotiating parties needs protection from the risks inherent in the gap of time between the sending and receiving of a letter from a special rule of law is less persuasive than may have seemed to be the case in the mid-nineteenth century and before. If for example, Aloysius merely posts an acceptance to offeror Bertha, without using one of the many available means of letting her know that the communication is on its way, the latter might seem to have the stronger case for protection from delay in the mail system or actual loss in the post. This, it can be argued, would better accord with the ordinary expectations of those parties (particularly commercial entities) who engage in contracts, looking to the law to provide a reasonable and equitable allocation of risk. The approach favoured in business today, we think, is shown by the common use in offers of clauses requiring an acceptance to reach the offeror to be effective.[26]

4.13 We therefore think that, with one exception to be discussed further below, there is now no need to provide for a postal exception to the general rule that an acceptance must reach the offeror to conclude a contract. This Commission has taken the view since 1977 that both offers and acceptances should be effective only when they have reached the other party.[27] Such a position would better accord with the reasonable expectations of ordinary people and indeed, the commercial community, in Scotland. In previous consultations, respondents have indicated to the Commission that abolition of the postal acceptance rule is desirable. We accordingly propose:

28. There is no need to introduce in any statutory restatement of the law on formation of contract an exception for postal acceptances to the proposed rule that an acceptance is effective when it reaches the offeror.

4.14 There is, however, one important function of the postal acceptance rule which we think should continue to be part of the law on formation of contract, namely the protection of the offeree who has sent an acceptance unaware that a revocation of the offer is on its way from the offeror at the same time. It would be unsatisfactory if such cases became disputes about which of the two communications had been first to reach its intended recipient and become effective. In our discussion of revocation of offers in Chapter 4, however, we have already proposed a rule dealing with this issue, namely, a rule that an offer may not be revoked once the offeree has sent an acceptance, on the basis that a party which has done all it can to effect an acceptance should thereafter be free from concern about subsequently arriving revocations.[28] The rule would clearly be the right one where the parties are in instantaneous or near-instantaneous communication with each other, and there seem to be no strong reasons for departing from it where the parties are distant and for some reason

held to apply to it only early in the twentieth century: *Bruner v Moore* [1904] 1 Ch 305. There is no Scottish authority directly in point.

[26] See eg the example cited at fn 22 to para 4.10 above.

[27] Indeed, the postal rule is not found in the draft Contract Code prepared by the Law Commissions between 1965 and 1973 (on which see fn 22 to para 1.12 above).

[28] See para 3.20.

choosing the postal system rather than using the speedier forms of communication available to them. We accordingly propose:

> **29. Were there to be a statutory restatement of the law on formation of contract it should be provided that the sending of an acceptance by the offeree will prevent a subsequently arriving revocation of the offer taking effect.**

(iii) Acceptance of general offer by uncommunicated act

CISG (RFC Draft Bill)	**9.** (3) However, if by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in … paragraph *(2) above*. (*CISG Article 18*)
PICC	***2.1.6 Mode of acceptance*** (3) However, if by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective at the moment the act is performed.
DCFR	***II.-4:205 Time of conclusion of the contract*** (3) If by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by doing an act without notice to the offeror, the contract is concluded when the offeree begins to do the act.
Proposed CESL	***Article 35: Time of conclusion of the contract*** (3) Notwithstanding paragraph 2, where by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by conduct without notice to the offeror, the contract is concluded when the offeree begins to act.

4.15 The CISG, the PICC, the DCFR and the proposed CESL all make similar provisions for an exception to the general rule that acceptance must reach the offeror to form a contract between the parties. This exception dispenses with the general rule in favour of acceptance by an act uncommunicated to the offeror in cases where the offer itself so provides, expressly or impliedly (perhaps most typically in a general offer); or where the parties have established a practice to that effect between themselves; or where there is a usage to that effect, for example in a particular trade. The DCFR and the proposed CESL perhaps improve on the CISG and the PICC by providing that this uncommunicated acceptance is completed when the offeree begins performing the required act. So in the most famous example of a general offer in the existing law, Mrs Carlill's acceptance of the Carbolic Smoke Ball Company's general offer of a reward to anyone catching influenza despite using the

company's product would be complete from the time she began to use it in accordance with the producer's directions.[29] The exception is consistent with the over-arching principle of party autonomy; it would also, as the RFC pointed out, allow parties who so wished to reinstate a postal acceptance rule between themselves.[30] An explicit legislative statement would, however, avoid arguments about the extent to which the principle of party autonomy allowed implicit departures from the default rule about acceptance having to reach the offeror through the general nature of the preceding offer, course of dealing between the parties, or customs of a trade or geographical area. We accordingly ask:

30. Were there to be a statutory restatement of the law on formation of contract in which the general rule was that acceptance concluded a contract when it reached the offeror,

a) should provision be made for an exception for performance of an act uncommunicated to the offeror in cases where:

i) the offer itself so provides, expressly or impliedly,

ii) the parties have established a practice to that effect between themselves,

iii) there is a usage to that effect?

b) should such a rule also state that a contract is concluded when the offeree begins to perform the required act?

(iv) Time limit for acceptance

CISG (RFC Draft Bill)	**9.** (2) … An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise. (*CISG Article 18*)
PICC	***2.1.7 Time of acceptance*** An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.
DCFR	***II.-4:206 Time limit for acceptance*** (1) An acceptance of an offer is effective only if it reaches the offeror within the

[29] *Carlill v Carbolic Smoke Ball Co Ltd* [1893] 1 QB 256 (CA), where it was held that by the terms of its offer the company had waived any requirement that acceptance be communicated to it.
[30] RFC, para 4.15.

	time fixed by the offeror. (2) If no time has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time. (3) Where an offer may be accepted by performing an act without notice to the offeror, the acceptance is effective only if the act is performed within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.
Proposed CESL	***Article 36: Time limit for acceptance*** 1. An acceptance of an offer is effective only if it reaches the offeror within any time limit stipulated in the offer by the offeror. 2. Where no time limit has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time after the offer was made. 3. Where an offer may be accepted by doing an act without notice to the offeror, the acceptance is effective only if the act is done within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

4.16 The proposed CESL, the DCFR, PICC and CISG all have rules requiring acceptances to reach the offeror within any time limit stated in the offer. This is of course inconsistent with the position under the postal acceptance rules of Scots and English law.[31] But the postal rule apart, the general rule in Scots law is that an acceptance outwith any time limit set by the offeror is ineffective to conclude a contract[32] and that, again as in the CISG, the PICC, and now the DCFR and the proposed CESL, if no time is fixed, the offer must be accepted within a reasonable time.[33] In assessing the period of reasonable time, the CISG (essentially followed in the PICC) requires that due account be taken of the transaction's circumstances, including the rapidity of the means of communication used by the offeror; but this is omitted in the DCFR.[34] In Scots law:

> "What is a reasonable time is a question of fact. It depends on the circumstances of each case. There are no hard and fast rules. It is also a problem to be solved by the standard of the reasonable observer, rather than the secret whims of the parties. An offeror who needs an unusually quick acceptance should specify this in the offer. Otherwise, the offeror cannot complain if the acceptor, ignorant of the urgency, acts with the deliberation of the reasonable person."[35]

4.17 The DCFR and the proposed CESL also drop the specific CISG/PICC rule requiring immediate acceptance of oral offers. As the RFC pointed out, there is no Scottish authority

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[31] *Jacobsen Sons & Co v Underwood & Son Ltd* (1894) 21 R 654; *Adams v Lindsell* (1818) 1 B & Ald 681; *Dunlop Wilson and Co v Higgins* (1848) 6 Bell's App 195.
[32] McBryde, *Contract*, paras 6.45-6.47.
[33] Ibid, paras 6.48-6.52.
[34] See DCFR, vol 1, p 319 (Comment C).
[35] McBryde, *Contract*, para 6.49, noting that the equivalent paragraph in the previous edition was applied in *Flaws v International Oil Pollution Compensation Fund* 2001 SLT 897 (OH); affirmed on another point 2002 SLT 270 (IH).

to the effect of the CISG rule.[36] But it must be a question of the particular circumstances whether or not an immediate acceptance is the reasonable thing to do in response to an oral offer,[37] so presumably the DCFR, followed in this by the proposed CESL, saw no need to spell out a specific rule when there was already a general one of reasonable time.

4.18 We accordingly propose:

> **31. In the event of any statutory restatement of the law on formation of contract, the rules on time limits for acceptance should enable the offeror to fix a time limit for acceptance, with the limit for acceptance otherwise being a reasonable time after the offer was made.**

4.19 Finally in this section, the DCFR and the proposed CESL add to the CISG rule a further rule about when an act must be performed to be an uncommunicated but effective acceptance of an offer: in line with the other rules in this area, the act must be performed within any time limit set by the offeror, or within a reasonable time. So if the Carbolic Smoke Ball Company states that its general offer for a reward will run through the month of December only, Mrs Carlill must commence her use of the smoke ball in that month to create a contract for the payment of the reward to her if, despite her inhalation of the product's vapours, she falls victim to influenza.[38] In the event that the rule about when uncommunicated acts may be effective acceptances were to be adopted in any statutory restatement of the law on formation of contract, this further rule would be a helpful if not necessary elaboration upon it. We accordingly propose:

> **32. If a rule about when uncommunicated acts may be effective acceptances (like that suggested in question 30 above) is adopted in any statutory restatement of the law on formation of contract, there should also be a rule that the act must be performed within any time limit fixed by the offeror, or within a reasonable time after the offer is made.**

(v) Calculating the time for acceptance

CISG (RFC Draft Bill)	**11.** (1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree. (2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first

[36] RFC, para 4.8.
[37] RFC, para 4.8, cites what is now McBryde, *Contract*, para 6.50, which provides an example of where an immediate acceptance of an oral offer would be appropriate. See further Vogenauer and Kleinheisterkamp, *PICC Commentary*, pp 268-269.
[38] See para 4.15 above. She could, however, fall victim to the influenza in January and still claim the reward – the contract having been formed in December – unless the Carbolic Smoke Ball Company further specified in its offer that the offeree had to be struck down by influenza in the latter month as well.

	business day which follows. (*CISG Article 20*)
DCFR	***I. – 1:110: Computation of time*** (8) Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the date stated as the date of the document or, if no date is stated, from the moment the document reaches the addressee.
Proposed CESL	***Article 11: Computation of time*** 6. Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee.

4.20 The time limits set for acceptance are not always clearly stated in offers. The RFC gave the example of an offer stating that it had to be accepted "within three days". When does the period begin and end? The CISG provides rules of interpretation to assist in these kinds of questions which the RFC thought "reasonable enough in themselves" and adoption of which was consequently thought to present no particular difficulties.[39] The CISG rules also have the advantage of focussing on offer and acceptance, whereas in contrast the DCFR and the proposed CESL are more general in their application. But the CISG rules are also somewhat outmoded in their initial reference to telegrams and are perhaps not suitable for direct adoption in any legislation seeking to re-state the law on formation of contract. The general pattern in the instruments is that a period of time stated for an acceptance to be made begins to run from the moment the offer reaches the offeree. This is consistent with the general principle that communications only become effective upon reaching their addressees. The rule is clearly subject to anything that may be expressed in or implied from the document or other relevant circumstances. We think accordingly that adoption of such a default rule would still present little if any difficulty but will welcome comment on whether such a rule would be helpful. We therefore ask:

33. In any statutory statement of the law on formation of contract, would a rule that a period of time stated for an acceptance begins to run from the moment that the offer reaches the offeree, subject to any contrary express statement in the offer or any other indication to the contrary implicit in the offer or in the relevant surrounding circumstances, be useful?

[39] RFC, paras 4.20-4.22.

(vi) Modified acceptance

CISG (RFC Draft Bill)	**10.** (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of … goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially. (*CISG Article 19*)
PICC	***2.1.11 Modified acceptance*** (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
DCFR	***II.-4:208 Modified acceptance*** (1) A reply by the offeree which states or implies additional or different terms which materially alter the terms of the offer is a rejection and a new offer. (2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract. (3) However, such a reply is treated as a rejection of the offer if: (a) the offer expressly limits acceptance to the terms of the offer; (b) the offeror objects to the additional or different terms without undue delay; or (c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

Proposed CESL	***Article 38: Modified acceptance*** 1. A reply by the offeree which states or implies additional or different contract terms which materially alter the terms of the offer is a rejection and a new offer. 2. Additional or different contract terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are presumed to alter the terms of the offer materially. 3. A reply which gives a definite assent to an offer is an acceptance even if it states or implies additional or different contract terms, provided that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract. 4. A reply which states or implies additional or different contract terms is always a rejection of the offer if: (a) the offer expressly limits acceptance to the terms of the offer; (b) the offeror objects to the additional or different terms without undue delay; or (c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

4.21 The DCFR re-jigs the wording of the CISG and the PICC into a form accepted for the proposed CESL. The basic effect of the texts is, however, identical.[40]

4.22 First, if an offeree replies to an offer with what purports to be an acceptance but which contains terms materially different from those in the offer, the reply is not an acceptance but a rejection of the offer and a new (or, in the language of the CISG and the PICC, a counter) offer. The CISG provides a non-exclusive definition of terms that may be material for these purposes but although this might be thought a useful aid towards certainty nothing similar is found in any of the other texts. Scots law is to the same basic effect, save that it is not clear how far there is a requirement that the difference between offer and acceptance must be material.[41] It has also been held that although an offer falls as such when met with a qualified acceptance, those parts of the offer with which the qualified acceptance is consistent can be carried forward as part of the counter-offer which is also constituted by the qualified acceptance.[42]

4.23 It is less certain how far the second proposition to emerge from the CISG, the PICC, the DCFR and the proposed CESL texts above, that non-material additions or alterations

[40] On the PICC version see Vogenauer and Kleinheisterkamp, *PICC Commentary*, pp 278-284.
[41] *Wolf & Wolf v Forfar Potato Co* 1984 SLT 100 (IH); *Rutterford Ltd v Allied Breweries Ltd* 1990 SLT 249 (OH); *Tenbey v Stolt Comex Seaway Ltd* 2001 SC 638 (OH); *Pinecraven Construction (Guernsey) Ltd v Taddei* [2012] CSOH 18 (OH). See further McBryde, *Contract*, paras 6.92-6.94.
[42] *Howgate Shopping Centre Ltd v GLS 164 Ltd* 2002 SLT 820 (OH) at 826 (Lord Macfadyen).

made to the offer in what is otherwise an acceptance become part of a contract taken as concluded by that acceptance, is also good Scots law. This was not discussed in the RFC, which instead concentrated on the extent to which the rule could provide a solution to the problem of the 'battle of the forms'.[43] We deal with that problem in the next chapter. Here we focus simply on the position where a purported acceptance in fact introduces new but 'non-material' elements compared to the offer. Can there ever be such a purported acceptance, and could it ever form a contract in Scots law?

4.24 Professor McBryde points to some case law which may suggest that there can be a contract in at least some such situations.[44] In *Wight v Newton*,[45] where there was agreement between parties on the essentials of a lease, a contract was found to exist despite discrepancies between them on other non-essential matters. But this is not quite like the outcome envisaged in the CISG, the PICC, the DCFR and the proposed CESL, where the non-material additions or alterations made by the acceptance, far from failing to prevent a contract coming into existence, form part of that contract rather than, as in *Wight*, simply being disregarded.

4.25 More significant is a body of Scottish cases showing, in Professor McBryde's words, that "conditions can be added to the acceptance which do not prevent consensus".[46] By conditions, he means, not terms of the contract, but rather facts or circumstances upon which the enforcement or enforceability of the contract will depend. If the condition proposed in the acceptance is one which does not require the consent of the offeror, for example because it is about the inevitable mechanics of the transaction, then its statement does not prevent there being a contract, and the condition will be part of the contract. McBryde cites as instances of this, statements in acceptances that the offeror would need to execute a disposition[47] or a formal lease[48] or a stock transfer[49] or to complete a form[50]. Again, if the offeree's statement is something the law would imply anyway – for example, that goods to be sold will be of satisfactory quality – there is no need for the offeror to consent before a contract is formed. In all these instances the additional element stipulated in the acceptance not only fails to prevent a contract being formed but is in fact part of the contract, on the basis that it would have been so anyway.

4.26 If on the other hand the condition stated by the offeree is suspensive, deferring the contract's enforceability (for example, it says that acceptance is "subject to contract")[51], or if it is contrary to what the law would imply, [52] the offeror's agreement to that condition is required before a contract can be formed. McBryde also doubts whether the introduction by the offeree of a resolutive condition upon the occurrence of which the contract would come

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[43] RFC, paras 4.17-4.19.
[44] McBryde, *Contract*, paras 6.86-6.88.
[45] *Wight v Newton* 1911 SC 762 (IH). This case is usually contrasted with *Buchanan v Duke of Hamilton* (1878) 5 R (HL) 69. See also *Avintair Ltd v Ryder Airline Services Ltd* 1994 SC 270 (IH), where a contract of services was held to exist, despite dissensus upon the price, because the court could fix a reasonable price.
[46] McBryde, *Contract*, para 6.87.
[47] *Thomson v James* (1855) 18 D 1.
[48] *Erskine v Glendinning* (1871) 9 M 656.
[49] *Tait & Crichton v Mitchell* (1889) 26 SLR 573.
[50] *Seaton Brick and Tile Co v Mitchell* (1900) 7 SLT 384 (IH).
[51] As in *Stobo Ltd v Morrisons (Gowns) Ltd* 1949 SC 184 (IH); *Chisholm v Wardrope* 2005 SCLR 530 (OH).
[52] See *Towill & Co v British Agricultural Association* (1875) 3 R 117 (IH), where a seller of goods had stipulated that payment of the price must be by cash on delivery but the buyer's confirmation provided for payment by cash 14 days later. With regard to sale of goods, the default rule is that delivery and payment are concurrent conditions.

to an end – for example, if a trial of the goods supplied is failed, or if an event does not take place – is possible without acceptance by the original offeror: "[t]he existence of a sword of Damocles should require the assent of both parties."[53]

4.27 If then there is anything in Scots law like the CISG/PICC/DCFR/proposed CESL rule about non-material alterations and additions in a purported acceptance not blocking the formation of a contract, its scope is very limited, probably covering only the situations where the extra stipulation would have been part of the contract regardless, either as an implied term or as a necessary action to give effect to the contract. The adoption of a rule like that in the international instruments would therefore be quite a significant development of the present law. It might create uncertainty in an area where certainty of outcome is highly desirable, by forcing parties to consider whether alterations or additions to an offer made in a purported acceptance were material or not.

4.28 On the other hand, such a rule could prevent a party escaping what was very substantially an agreement because of some relatively trivial difference between the offer and acceptance. We note that when the basic rule on qualified acceptances was first applied to exchanges of missives in the 1990s, there was some surprise about it in the conveyancing world.[54] It can certainly be argued that the legal effects of a qualified acceptance should not necessarily be the same as that of an outright rejection or refusal of an offer.[55]

4.29 The element of uncertainty is considerably mitigated in the CISG, the PICC, the DCFR and the proposed CESL texts by allowing the offeror to stipulate in the offer that only complete acceptance will be binding, or to prevent the acceptance forming a contract by objecting to the new terms without undue delay. The offeree can also reduce uncertainty by making the acceptance conditional upon the offeror's assent within a reasonable time to the additional or different terms.

4.30 With regard to a possible statutory restatement of the law on formation of contract, we therefore ask:

34. a) Do consultees agree that, in general, when a purported acceptance states different terms from those contained in the offer to which it is a reply it should be treated as (i) a rejection of the offer; and (ii) a new or counter-offer? (This would not prevent the possibility that agreed terms from the first offer could be incorporated expressly or impliedly in the new or counter-offer.)

b) If not, would consultees prefer the solutions contained in the DCFR and the proposed CESL i.e. that a purported acceptance should only have the effect of rejecting the offer and becoming a counter-offer if the difference between the two statements was material?

c) If option b) is preferred,

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[53] McBryde, *Contract*, para 6.88. But see *Hardy v Sime* 1938 SLT 18 (OH) at 20 (Lord Keith).
[54] David A Brand, Andrew J M Steven and Scott Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004), para 28.8, as cited by McBryde, *Contract*, para 6.94, fn 295.
[55] See the discussion in McBryde, *Contract*, para 6.94.

i) would a non-exclusive definition of materiality along the lines found in the CISG Article 19(3) be useful?

ii) should the effect of non-material differences be that a contract is formed with the addition of the additions and alterations contained in the acceptance, subject to the offeror's contrary stipulation in the offer or objection without undue delay upon receipt of the acceptance?

iii) should it also be possible for the offeree making an acceptance with non-material differences from the offer to require the offeror's assent thereto within a reasonable time before a contract is formed?

(vii) Late acceptance

CISG (RFC Draft Bill)	**12.** (1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect. (2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect. (3) For the purposes of this *Rule* "writing" includes telegram and telex. (*CISG Articles 21 and 13*)
PICC	***2.1.9 Late acceptance. Delay in transmission*** (1) A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives notice to that effect. (2) If a communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.
DCFR	***II.-4:207 Late acceptance*** (1) A late acceptance is nonetheless effective as an acceptance if without undue delay the offeror informs the offeree that it is treated as an effective acceptance. (2) If a letter or other communication containing a late acceptance shows that it has been dispatched in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer is considered to have lapsed.

Proposed CESL	***Article 37: Late acceptance*** 1. A late acceptance is effective as an acceptance if without undue delay the offeror informs the offeree that the offeror is treating it as an effective acceptance. 2. Where a letter or other communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed.

4.31 The general rule in the CISG, the PICC, the DCFR and the proposed CESL is that an acceptance must reach the offeror within the time stated in the offer or, if no such statement is made, within a reasonable time.[56] Under each text, however, there are two further rules under which late acceptances may be effective. The first deals with the acceptance which arrives late with the offeror. Such an acceptance may conclude the contract if without delay the offeror so advises the offeree. The second rule deals with the acceptance which, had transmission processes worked normally, would have arrived on time. Such an acceptance is effective to conclude a contract unless without delay the offeror advises the offeree otherwise. In the first rule, therefore, there is a contract only if the offeror so decides, because the offeree is not entitled to assume that the acceptance will be effective. With the second rule there is a contract unless the offeror decides not, because the offeree was entitled to assume that its acceptance would be effective.[57] In both cases the offeror's decision must be made and communicated to the offeree without undue delay;[58] the second rule gives the offeror some protection against being bound to a contract which it was entitled to assume was not going to happen.

4.32 The RFC noted that the first rule produced "practically the same result as the existing [Scots] law, under which the late acceptance would be treated as a counter-offer which the offeror could accept."[59] The second rule provided a form of protection for the offeree against failures of the transmission process which, at least with regard to transmission by post, was not necessary in Scotland because of the postal acceptance rule. But if that rule were to be abolished, then the protection which it gave the offeree might need to be replaced. The second rule would thus be "a sensible corollary to the change in the postal rule."[60] The DCFR gives the example of a letter caught in transmission by a postal worker strike.[61]

4.33 We might also note that the second rule could perform a useful function in relation to a number of other modern forms of communication. Widespread power failures may affect electronic communications systems for unpredictable periods of time. We therefore ask:

[56] See paras 4.16-4.20 above.
[57] See DCFR, vol 1, p 322 (Comment C); Vogenauer and Kleinheisterkamp, *PICC Commentary*, pp 273-275.
[58] See Vogenauer and Kleinheisterkamp, *PICC Commentary*, pp 273-274.
[59] RFC, para 4.24, citing *Wylie and Lochhead v McElroy* (1873) 1 R 41 (IH) and Gloag, *Contract*, p 37. McBryde, *Contract*, does not appear to deal directly with the problem of a late acceptance.
[60] RFC, para 4.25.
[61] DCFR, vol 1, p 322 (Illustration 2).

35. Should any statutory restatement of the rules of formation of contract include a provision to the effect that, if an acceptance which arrives late shows that it was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed?

4.34 The RFC discussed the problem of very late acceptances, arriving weeks or months after the closure of the offer. The issue that might arise is the opening up of opportunities for unfair speculation: where due to market fluctuations it would be very much to the offeror's advantage and the offeree's disadvantage for the former to take up the contract. An example might be the offeror having offered to charter a ship at a time when the daily charter rates were relatively high, but by the time the acceptance arrives the general availability of ships is much greater and the daily charter rate in the market three or four times less than it was.[62] The RFC raised the question of whether a doctrine of change of circumstances might apply in such cases so that the offer would be treated as having fallen.[63] Such a doctrine is, however, not found in the CISG and the DCFR/proposed CESL rules on contract formation, perhaps because their requirements of good faith would cover the particular case.[64] For Scots law, however, a specific rule on change of circumstances, as suggested above,[65] would seem a better way of dealing with this particular problem. We therefore ask:

36. If there was to be a rule under which a late acceptance could nonetheless conclude a contract, should there be a further rule that this effect would not arise where there had been a material change of circumstances since (a) the acceptance was first sent; or (b) the expiry of the time limit contained in the offer?

(viii) Withdrawal of acceptance

CISG (RFC Draft Bill)	**13.** An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective. (*CISG Article 22*)
PICC	***2.1.10 Withdrawal of acceptance*** An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.
DCFR	***I.-1:109 Notice*** … (5) The notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.
Proposed CESL	***Article 10: Notice*** … 5. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.

[62] This scenario is based upon a reversal of the sequence of events in *The Achilleas* [2009] 1 AC 61.
[63] RFC, para 4.26.
[64] See discussion at para 3.33 above.
[65] Ibid, and q 22.

4.35 Through their rules on notices, the DCFR and the proposed CESL are to the same effect as the CISG and the PICC in allowing acceptances to be withdrawn if the withdrawal reaches the offeror before or at the same time. The rule follows logically from the general position that an acceptance takes effect when it reaches the offeror.[66] If there is a period of time while the acceptance is in process of delivery, then that opens up the possibility of an offeree changing its mind and using a speedier mode of communication to inform the offeror of this. A posted letter may be overtaken by a telephone call or email, for example. There is no prejudice to the offeror in allowing an acceptance to be withdrawn in this way, because that party has no reason to suppose that there is a contract.

4.36 The strict logic of the present postal acceptance rule in Scots law would suggest that such an acceptance cannot be withdrawn once posted, because from that moment there is a contract which can only be cancelled from that point on with the consent of both offeror and offeree. The old case of *Countess of Dunmore v Alexander*[67] can, however, be read as authority for the view that the strict logic of the postal acceptance rule has not always been fully applied in Scots law, and that there is no contract when a postal acceptance and a withdrawal thereof arrive together at the offeror's place. There are, however, numerous ways of interpreting *Countess of Dunmore v Alexander*, and the ratio of the case is far from clear in the printed reports.[68]

4.37 If, however, the postal acceptance rule were to be replaced in Scots law by a rule that in general acceptances had to reach the offeror to be effective, we think with our predecessors that a further rule along the lines set out above is "simple and obvious".[69] The RFC recognised that the operation of such a rule in a rapidly fluctuating market place would enable the offeree to speculate somewhat at the offeror's expense, but suggested that a party aware of this could use its autonomy in formulating the offer to set very short time limits for acceptance or to require acceptance to be by the quickest available means of communication.[70] We therefore propose:

> **37. In the event of the abolition of the postal acceptance rule, there should be enacted a rule by which an acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.**

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[66] See Vogenauer and Kleinheisterkamp, *PICC Commentary*, p 277.
[67] (1830) 9 S 190.
[68] We have benefited here from an opportunity to read an unpublished study of the *Countess of Dunmore* case by Mr Ross Macdonald of Dundee University.
[69] RFC, para 4.27.
[70] RFC, para 4.28.

Chapter 5 The Battle of the Forms

Introduction

5.1 In this chapter we discuss a problem which has been considered by the Commission on a number of previous occasions: the 'battle of the forms', where each of the parties attaches to what purports to be an offer on one side and an acceptance on the other a set of standard or non-negotiated terms of business which it normally uses in transactions on the basis that these will be the terms of the resulting contract. To judge from the decided cases in the United Kingdom, the typical case involves the supply of goods between businesses where both sides make a large number of similar transactions, probably with third parties in both cases as well as with each other. The buyer will use what are often known as 'purchase order' forms, while the supplier will respond with an 'acknowledgement of order'. The requirements of the particular transaction – for example, description and quantities of the goods, unit price, and date of delivery – will appear on the front of the forms, while the reverse will contain each party's standard terms of business. Each party is aiming to keep to the essential minimum the amount of negotiation preceding the formation of a contract, and often there is also significant interest in speedy performance. Each party's forms are often processed by specialist departments or staff members whose job is not negotiation but keeping and processing records and then ensuring that performance is initiated once the documentation process is complete. We wish to ascertain to what extent this scenario presents problems in practice and therefore ask:

> **38. Are consultees aware of problems surrounding the 'battle of the forms' being significant in practice? Are the problems surrounding the 'battle of the forms' confined to transactions involving the sale of goods, or are the problems wider?**

The problem and how it is currently resolved

5.2 It is of common occurrence that the two sets of terms exchanged by the parties conflict with each other on crucial matters such as delivery obligations, price calculations, and liability for defective, late or complete non-performance of the contract. Thus according to the ordinary rules of offer and acceptance, the failure of the parties' exchange to produce consensus on the terms can mean that there is no contract. Yet very often the parties will proceed to performance and the supply of goods, services and even payment, at least in part. Only if dispute breaks out does it become critical to know whether there is a contract and what its terms may be. The general assumption is that, at least where there has been actual performance, the solution must lie in contract law rather than the obvious alternative, unjustified enrichment, especially as it may be problematic for the latter to deal adequately with the commonest kinds of problem such as liability for defective goods, delayed performance and disputes about price.[1] A contract solution also avoids the danger of

[1] In England, Professor Ewan McKendrick has offered a detailed argument about how the law of restitution might apply in a battle of the forms case if there was held to be no contract: Ewan McKendrick, "The battle of the forms and the law of restitution" (1988) 8 Oxford Journal of Legal Studies 197. No equivalent analysis exists as yet for

enabling one of the parties to an on-going transaction to pull out with relative impunity if the bargain starts to go badly for that person.[2]

5.3 In resolving such disputes, the Scottish courts have tended to utilise a traditional offer and acceptance analysis of the exchange of forms to determine whether or not there is a contract, and if so, what its terms are.[3] This has generally meant that the 'battle of the forms' is won by the party which is the last to send out its terms. The other party's previous sending of its form is an offer which is however met, not with unqualified acceptance but with a different set of terms, i.e. a counter-offer. If the first party then does no more than commence performance, that falls to be treated as acceptance by conduct of the second party's terms of business. Under this analysis, then, the 'last shot fired' wins the battle because a contract is found to exist upon the firer's terms alone. In the simple situation where a buyer sends a purchase order to which the supplier responds with an acknowledgement of order (possibly sending the goods at the same time or shortly thereafter), the buyer's acceptance will be constituted by taking delivery of the goods without immediate objection or, perhaps, by paying the price or part of it ahead of delivery.[4]

Difficulties with the current solution

5.4 The apparently inevitable victory of the 'last shot fired' may tend to encourage inappropriate attempts to be the firer of that shot, defeating the general policy goal of enabling business parties (which the participants in a battle of the forms will invariably be) to conclude their contracts with the minimum necessary legal complication and formality. In our simple example above, the alert buyer might respond to the supplier's acknowledgement of order with a further form reinstating its own terms, so that the supplier's subsequent performance could become an acceptance of those terms. But this, it has been said by an experienced English commercial lawyer, "does not work well in practice", at least for the buyer seeking to ensure that its terms prevail:

> "In many cases, it does not fit into the administrative systems of the parties, nor is it a usual way of doing business. Not only is this burdensome and difficult to administer, but it becomes very noticeable to the seller. The seller is then likely specifically to reject the buyer's acknowledgement, and a detailed negotiation as to whose conditions are to govern the contract will probably ensue. This defeats the purpose of doing business on standard conditions (speed and efficiency in dealing with a large number of transactions), and the purchasing departments of both the buyer and the seller will probably be unable to cope with the work load imposed if there are many such special negotiations."[5]

Scots law, although the law of unjustified enrichment might now be thought sufficiently mature for the attempt to be made. We think, however, that this is not the place for such an exercise.

[2] Furmston and Tolhurst, *Contract Formation*, para 4.134.

[3] McBryde, *Contract*, paras 6.97-6.105; *Chitton Bros Ltd v S Eker Ltd* (OH, Lord Grieve), 8 July 1980, unreported; *Uniroyal Ltd v Miller & Co Ltd* 1985 SLT 101 (OH); *Continental Tyre & Rubber Co Ltd v Trunk Trailer Co Ltd* 1985 SC 163 (IH). For a recent case in which each party to a commercial contract for the supply of goods used its own standard terms but it was held that *neither* set of terms was incorporated into the contract, see *C R Smith Glaziers (Dunfermline) Ltd v Toolcom Supplies Ltd* [2010] CSOH 7; 2010 GWD 13-236, discussed at para 5.22.

[4] The English courts also tend to follow this approach: see most recently *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 2 All ER (Comm) 302. The approach stems from the classic cases of *British Road Services v Arthur V Crutchley & Co Ltd* [1968] 1 All ER 811 (CA) and *Butler Machine Tool Co v Ex-cell-o Corp (England)* [1979] 1 WLR 401 (CA). See generally Chitty on Contracts, paras 2.034-2.037.

[5] Christou, *Drafting Commercial Agreements*, p 115.

5.5 Parties may also send with their standard terms documents for the other side to sign and return, purporting to accept the terms proposed. The same English commercial lawyer has said of one situation where this approach was used by a business over a number of years, "it was found to operate successfully in more than 50 per cent of the cases."[6] This, however, carries the implication that the procedure did *not* work in a large number of cases, amounting to perhaps more than 40 per cent of them. The reason for these failures emerges in a further passage from the same author:

> "The only practical problem encountered (apart from cases where the proffered acknowledgement form was ignored, and the seller returned his own acknowledgement form or called for a special negotiation) was that some sellers' administrative systems required the issue of their own acknowledgement form before an order could be logged. They therefore issued their own form and sent back both the buyer's form and their own form. Under these circumstances, unless the seller's own acknowledgement was poorly drafted … without a special negotiation it was almost impossible to decide in individual cases which set of conditions prevailed."[7]

5.6 Another technique designed to prevent victory going to the last shot fired is the use of so-called over-riding or paramount clauses in standard forms. Such a clause declares in effect that the set of terms in which it appears prevails over any other terms which may be included in the other side's response. The courts have, however, tended to hold that such clauses fail to prevent any response being a counter-offer with a knock-out effect on the over-riding clause along with the rest of the terms in which it appeared.[8] Professor Angelo Forte of the Aberdeen Law School has argued strongly for many years that the courts should give greater recognition to such over-riding clauses.[9] The basis in principle for this argument is that an offeror may provide in the offer what is needed for acceptance; so that if the offer states that it will be accepted by the return of the offeree's standard form, even if that form contains different terms, then that will be enough to form a contract. It may be thought, however, that this approach might simply mean that the first shot would always win the battle rather than the last, which may be no more satisfactory an outcome to the problem. Nor does it really explain why the offeror's form should be the sole basis for the terms of the resultant contract. Further, the effect where each side uses an over-riding clause in its standard terms, which has not yet been discussed in either the Scottish or English courts, is problematic.[10] Just because a party happens to be the offeror does not seem to be a good reason for preferring that party's over-riding clause to the offeree's.

5.7 It can of course be suggested that the best way for business parties to avoid a battle of the forms is to negotiate about the differences between their respective standard forms. But the whole point of such forms and their use is to reduce as much as possible the time spent bargaining in advance about eventualities which the parties do not actually expect to arise and which, if they do arise, the parties expect to bargain about then rather than now. Lawyers in many jurisdictions have long argued, therefore, that the application of offer and

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[6] Ibid.

[7] Ibid. Examples of the problem can be seen in *Butler Machine Tool Co Ltd* [1979] 1 WLR 401 and *Chitton Bros Ltd v S Eker Ltd* (OH, Lord Grieve), 8 July 1980, unreported.

[8] See *Butler Machine Tool Co Ltd* [1979] 1 WLR 401; *Uniroyal Ltd v Miller & Co Ltd* 1985 SLT 101 (OH). Note, however, *Roofcare v Gillies* 1984 SLT (Sh Ct) 8.

[9] The most recent statement of Professor Forte's arguments is in his article, "The battle of forms" in Hector MacQueen and Reinhard Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006), pp 98-122.

[10] Ibid at p 119 suggests that *Uniroyal* (cited in fn 8 above) was such a case, but this does not emerge clearly from the report and the matter was not discussed by the judge.

acceptance rules in this way to the battle of the forms leads to an inappropriate result, at least in so far as it declares that there is no contract in an exchange of forms alone. Further, the approach of treating the last shot fired as an offer which is then accepted by the other party's conduct makes the conclusion and the terms of the contract a matter of chance rather than agreement. In the supply of goods cases, the odds are probably stacked in favour of the supplier responding to the purchaser's order with its acknowledgement form, the usual sequence of the exchange of documents. But where there are more than two documents in a case – as, for example, where the seller produces a 'quotation' in response to a prospective buyer's inquiry, followed by that buyer's purchase order and then by the seller's acknowledgement of order, all with the respective parties' standard terms of business appended to them – it may be unclear which of the first two is the offer and which of the latter two, therefore, is the acceptance and the 'last shot' winner of the battle.

A solution by way of a special regime?

5.8 Hence, the argument runs, the law should provide a regime to deal specifically with the battle of the forms, holding the balance between the parties a little better, and, to achieve this, take the analysis of the situation outside the law of offer and acceptance. What matters is agreement, not offer and acceptance. The most famous example of such a special regime (for the sale of goods) is Section 2-207 of the Uniform Commercial Code of the USA. In its original and still extant form Section 2-207 read as follows:

> "(1) A definite and seasonable expression of acceptance … which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> > (a) the offer expressly limits acceptance to the terms of the offer;
> >
> > (b) they materially alter it; or
> >
> > (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

5.9 This has been much criticised, most trenchantly perhaps by Professor Grant Gilmore as "the greatest statutory mess of all time".[11] First, the Section is not limited to the battle of the forms. Its opening provision is simply a modification of the general requirement that to form a contract an acceptance must be unqualified. The contract that results from this is one which embraces both the offeror's terms and, in so far as they are additional (as distinct from

[11] See Mark E Roszkowski, "Symposium on Revised Article 2 of the Uniform Commercial Code-Section-by-Section Analysis" (2001) 54 SMU Law Review 927 at 932 (quoting letter dated 10 September 1980 from Gilmore to Professor Robert Summers of Cornell University). For a useful overview see Michael P Furmston, Takao Norisada and Jill Poole, *Contract Formation and Letters of Intent* (1998), paras 4.5-4.8.

different), the acceptor's terms. But the effect of this is limited in various ways under sub-Section (2), although not generally to prevent there being a contract. The issue addressed is rather, what are the terms of the contract that has been formed?

5.10 So, where the additional (but not the different) terms in the 'acceptance' materially alter the terms of the offer (which might be thought to apply in most if not all battles of the forms), the formation of a contract is not precluded; instead the acceptor's additional terms do not become part of the contract. Thus the acceptor may end up bound to a contract solely on the other party's terms; or, in other words, as the loser in the battle of the forms. The acceptor can forestall this outcome, however, by making its acceptance expressly conditional on the other party's assent to the additional terms; but this may lead to negotiation the need for which it is the parties' general objective to minimise by using standard forms. Sub-Section (2) gives no guidance on the position with regard to the 'acceptance' that contains *different* rather than *additional* terms: there is a contract, it would seem, but what the terms thereof may be is left unclear.

5.11 Again, the offeror's over-riding or paramount clause can head off the inclusion of the offeree's additional or different terms, but not the conclusion of a contract. The same result follows if the offeror states, either in advance or within a reasonable time after receiving notice of the additional or different terms, that it objects to these terms. The contract in all these cases will presumably be on the offeror's terms alone, so that once more the battle has a victor and a loser.

5.12 Finally sub-Section (3) provides for a different case, where the parties' exchange of writings does not disclose a contract, even on the preceding rules, but their conduct 'recognizes the existence of a contract' – for example, by the supply of goods or the making of a payment. Here there is a contract, despite the differences in the writings exchanged by the parties, and the terms are a combination of their forms where they agree plus any additional terms to be implied under other provisions of the UCC. The terms on which the writings do not agree are simply to be ignored. In this scheme the battle has neither victor or loser; instead the court is left to determine the contract terms with such aid as the parties jointly provide alongside the rules of the UCC on such matters as implied terms.

5.13 An amended version of UCC Section 2-207 was produced in 2003; but this has not yet been adopted in any US state; indeed, we understand that there is no prospect of this happening. This much more compressed version of the Section focuses more clearly on the question as one of a contract's content rather than on whether there is a contract at all.[12] The starting point is the previous sub-Section (3). The new version reads as follows:

> "If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract subject to Section 2-202 are:
>
> (a) terms that appear in the records of both parties;
>
> (b) terms, whether in the record or not, to which both parties agree; and

[12] For discussion see Furmston and Tolhurst, *Contract Formation*, paras 4.145-4.147.

(c) terms supplied or incorporated under any provision of this Act."

5.14 Applied to the battle of the forms, this assumes that a contract is formed, and lays down that neither party's form is the sole basis for that contract's terms. Instead, the terms are those that are agreed by the parties, whether or not in their 'records', i.e. their exchange of forms, and those which can be brought in by way of the UCC's rules. In other words, the terms of the contract will have to be determined by the court in the event that the parties are unable to agree what they are. The new Section 2-207 gives no role to over-riding clauses or objections by any party before or after the exchange of forms.

The solutions in the DCFR and other texts

5.15 With the UCC models in mind, we now turn to the four texts which we have been using in this Discussion Paper for the purposes of our Contract Law review.

CISG (RFC Draft Bill)	**10.** (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of … goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially. (*CISG Article 19*)
PICC	***2.1.22 Battle of forms*** Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.
DCFR	***II.-4:209 Conflicting standard terms*** (1) If the parties have reached agreement except that the offer and acceptance refer to conflicting standard terms, a contract is nonetheless formed. The standard terms form part of the contract to the extent that they are common in substance. (2) However, no contract is formed if one party: (a) has indicated in advance, explicitly and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or (b) without undue delay, informs the other party of such an intention.

Proposed CESL	***Article 38: Conflicting standard contract terms*** 1. Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded. The standard contract terms are part of the contract to the extent that they are common in substance. 2. Notwithstanding paragraph 1, no contract is concluded if one party: (a) has indicated in advance, explicitly, and not by way of standard contract terms, an intention not to be bound by a contract on the basis of paragraph 1; or (b) without undue delay, informs the other party of such an intention.

5.16 The CISG does not have any specific provision for the battle of the forms.[13] Instead the CISG leaves the problem to be solved by application of the rules already discussed on 'modified acceptances', under which, if the purported acceptor's standard terms do not materially alter the offeror's standard terms, then a contract is formed unless the offeror objects without undue delay.[14] The contract terms are those of the offer plus the modifications contained in the acceptance. This is somewhat akin to the original approach of UCC Section 2-207, with its emphasis on the formation of a contract despite the differences between the offer and the modified acceptance. But the CISG does not go nearly so far with this approach as UCC Section 2-207. Where the latter focuses entirely on what the terms of the contract are, the CISG follows the classical approach to formation in providing that if the differences between the terms are material, then the offer is to be treated as rejected, i.e. there is no contract at all; the purported acceptance is in these circumstances a counter-offer which the original offeror may then accept to form a contract.

5.17 The CISG approach can be criticised, however, as really a non-solution to the battle of the forms problem. The list of things which the CISG says are to be regarded as 'material' for the purpose of deciding whether or not a purported acceptance is sufficiently different from the offer to be a rejection of the latter – price, payment, quality and quantity of goods, place and time of delivery, extent of liability, dispute settlement – covers precisely the ground upon which standard terms of business are likeliest to differ. Therefore the outcome of a battle of the forms on THE CISG rules is highly likely to be no contract: a result which, it may be thought, is out of step with the commercial reality of the situation.

5.18 For this reason there are different special regimes for the problem in both the PICC and the DCFR, with the latter's solution now accepted for the proposed CESL.[15] All three are specifically directed to the case where the parties exchange their respective standard forms in the process of trying to form a contract. The gist of the solutions is very similar. Provided that the parties can be shown to be in sufficient agreement on the substance of the contract (which will generally be by way of performance on each side such as delivery of goods and payment or part-payment of a price, but might also be, for example, by way of a

[13] See Furmston and Tolhurst, *Contract Formation*, paras 4.148-4.149 for brief discussion.
[14] See paras 4.21-4.30 above.
[15] For the PICC solution, see Vogenauer and Kleinheisterkamp, *PICC Commentary*, pp 318-347 (Tjakie Naudé); Furmston and Tolhurst, *Contract Formation*, paras 4.151-152.

telephone call ahead of sending off a purchase or acknowledgement of order form[16]), an exchange of standard terms produces a contract despite the differences between the forms. The terms of the contract are those that have actually been agreed plus any common ground that there may be between the standard terms. This does not preclude the inclusion of terms from other sources such as the implied terms regimes found in all three documents. It is, however, possible for a party to declare in advance that it does not intend to contract under this regime, i.e. to insist upon contracting only under its own standard terms. It is also possible for a party who has made no such advance declaration to advise the other party that it does not intend to contract under the special regime once the standard forms have been exchanged, provided it does so without undue delay. Maximum scope is therefore given to party autonomy; but where the parties do not exercise this privilege but simply exchange forms and commence performance, any subsequent dispute will be decided in accordance with these rules.

5.19 In our RFC in 1993 we discussed a solution to the problem of the battle of the forms which we had first put forward in a consultation paper ten years earlier.[17] That solution bore some resemblance to the ones now being put forward in the PICC, the DCFR and the proposed CESL. It read: "Where there are differences between the terms of an offer and those of a purported acceptance of it, but it is reasonable to infer from the conduct of the parties that they share an assumption that a contract between them has been concluded, a contract should be deemed to have come into existence." The terms of the contract would be those on which the parties had agreed with either (a) "such other terms as may be necessary to give the contract proper effect" or (b) "such other terms as may be reasonable". But as the RFC noted and concluded:

> "This provisional proposal was not well received by those who commented on it … It would involve creating a contract for the parties and would give rise to great uncertainty."[18]

The RFC therefore decided against recommending the implementation of our previously suggested solution.

5.20 Some of the elements of uncertainty in the 1982 proposal may, however, have been eliminated by the PICC, DCFR and proposed CESL texts. For example, they do not depend on any reasonable inference of a contract from the conduct of the parties. Instead the question is the usual one for the formation of any contract: have the parties reached a sufficient agreement with intention for it to have legal effect, despite the differences between them which may appear from their different standard forms? The approach is objective, based upon what the parties are each reasonably entitled to conclude from the statements and conduct of the other. Moreover, the terms of the contract are not what the court thinks necessary or reasonable, but what the parties themselves can be seen objectively to have agreed, plus the material that can be brought in from other parts of the underlying text, i.e. the PICC/DCFR/CESL rules dealing for example with implied terms, remedies for non-performance and so on. The inquiry is thus much less at large than under our 1982 provisional proposal. There is still uncertainty but it is no greater than the uncertainty which already exists under the established 'last shot' analysis. Further, a party can relatively easily

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[16] This was the situation in *Uniroyal Ltd v Miller & Co Ltd* 1985 SLT 101 (OH).

[17] See Consultation Paper on Contract Law: Exchange of Standard Term Forms in Contract Formation (1982), available at http://www.scotlawcom.gov.uk/download_file/view/523/410/.

[18] RFC, paras 4.17 and 4.19.

escape the regime by either an advance declaration (which might include an over-riding clause, albeit one that would have to stand independently of the party's standard form) or a negative response made without undue delay to the other party's standard form.

5.21 The approach bears some resemblance to that found in a few recent English decisions in battle of the forms cases. Richard Christou summarises the effect of these cases as follows:

> "The parties will have agreed express terms which represent the basis for the transaction and are sufficiently certain to bring a legally binding contract into existence, but since neither of them is willing that the other's standard conditions should apply, the proper inference is that neither set of terms was applicable, and the remaining terms of the contract will be governed by statute and common law."[19]

Christou suggested in 2009 that this approach "is likely to be applied more often in the future. … [T]he courts are increasingly likely to adopt this .. approach."[20] His prediction has, however, not been borne out in the subsequent decision of the Court of Appeal in *Tekdata Interconnections v Amphenol Ltd*,[21] where the 'last shot' approach was unanimously reaffirmed, and Dyson LJ (now a Justice of the UK Supreme Court) said:

> "[I]t seems to me that the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships."[22]

5.22 A recent Scottish example along lines similar to those in the English cases discussed by Christou may, however, be provided by the decision of Lady Clark of Calton in *C R Smith Glaziers (Dunfermline) Ltd v Toolcom Supplies Ltd*.[23] In this case the parties exchanged, respectively, "purchase requisition order" and "despatch note" forms, the terms of neither of which, Lady Clark found, were incorporated into the contracts. It was not disputed, however, that many different contracts had come into existence between the parties from 1996 on and these had been successively performed over a period of several years. Following a preliminary proof, Lady Clark concluded that the contracts included the terms implied under section 14(2) (general fitness of the goods for their purpose) and 14(3) (reasonable fitness of the goods for the buyer's particular purpose) of the Sale of Goods Act 1979 as well as a further implied term that the goods were to be the products of one particular manufacturer. It was not necessary for the purposes of the case for her conclusions to go any wider than this, and Lady Clark's opinion makes no reference to the jurisprudence on the battle of the forms. But the background facts clearly did involve an element of battle of the forms, and it is clear that the failure of each side to ensure that its form was the basis for the contract terms did not prevent the court reaching a method of resolving the dispute between them on a contractual basis.

5.23 We sense, however, that despite the English cases discussed by Richard Christou and the *C R Smith* decision in Scotland, consultees may still have concerns about

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[19] Christou, *Drafting Commercial Agreements*, p 116, citing and discussing *Lidl UK GmbH v Hertford Foods Ltd* [2001] EWCA Civ 938; *J Murphy & Sons Ltd v Johnston Precast Ltd (formerly Johnston Pipes Ltd)* [2008] EWHC 3104 (TCC); *Tesco Stores Ltd v Costain Constructions Ltd* [2003] EWHC 1487 (TCC).
[20] Ibid.
[21] [2009] EWCA Civ 1209, [2010] 2 All ER (Comm) 302.
[22] Ibid at para 25.
[23] [2010] CSOH 7, 2010 GWD 13-236.

commercial uncertainty if a solution to the battle of the forms problem is adopted following the lines suggested by the PICC, the DCFR and the proposed CESL. In these documents there is at least a text from which the rules underpinning the terms to be supplied can be identified with greater readiness than may perhaps be possible in a contract law like Scots law, based principally on cases and juristic writings. The same may also be true of the UCC in the USA. If, however, most battle of the forms cases are about supply of goods, the consequent application of the quasi-codal Sale of Goods Act 1979 and related legislation may give a slightly greater degree of certainty about likely judicial outcomes in contested cases, as in the *C R Smith* case. In order to test opinion, we ask:

> **39. Is there a need for a specific solution to the problem of the battle of the forms? If so, should that solution be along the lines suggested by the PICC, the DCFR and the proposed CESL? If uncertainty is a concern with that solution, how might that best be ameliorated?**

A solution for long term relationships only?

5.24 A narrower approach to the problem of the battle of the forms may be raised by other comments in the *Tekdata* case.[24] Here the parties to a battle of forms were part of a production chain involving the manufacturing of aircraft components. Longmore LJ in obiter remarks suggested that "the context of a long term relationship and the conduct of the parties" could in certain circumstances dislodge the application of a 'last shot wins' conceptual analysis of a battle of the forms.[25] His suggestion seems to be that, in certain types of case where the parties have dealt with each other many times before, it may be open to them to argue that their previous course of dealing shows an intention to contract under terms and conditions other than those contained in what happens to be in the final counter-offer in the particular transaction under scrutiny.

5.25 Such an approach might be consistent with the rules on 'usages and practices' in the DCFR and the proposed CESL,[26] and would also be possible, it is thought, under Scots law as it stands at present in relation to the concept of incorporation of a set of terms by a course of dealing between the parties.[27] We have, however, already indicated some hesitancy about proposing the introduction of a legislative rule on usages, practice, custom or course of dealing in the context of an exercise limited to questions about formation of contract;[28] and we feel even greater hesitancy about proposing a rule based on such matters as a solution to the problem of the battle of the forms limited to long-term business relationships (however these might be defined). Once again, however, we think that it would be useful to test opinion and accordingly ask:

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[24] [2009] EWCA Civ 1209, [2010] 2 All ER (Comm) 302.
[25] Ibid at para 21.
[26] See paras 2.32-2.35 above. It may also be that the long-term practice of the parties could in a particular transaction within that relationship amount to an explicit advance indication that one party did not intend to be bound by the other's standard terms.
[27] See McBryde, *Contract*, paras 7.21-7.32.
[28] See paras 2.32-2.35 above.

40. If the answer to question 39 above is no, might there still be merit in making provision that, in respect of long-term commercial relationships only, an approach other than a strict offer-and-acceptance one is to apply in battle of the forms situations? If so, are the schemes in the PICC, the DCFR and the proposed CESL of any assistance in this context? To what sort of long-term commercial relationships might such an approach be applied?

PART 3: EXECUTION IN COUNTERPART

Chapter 6 Remote all-party signings of contracts: "execution in counterpart"

Background

6.1 During the consultation carried out by this Commission in the preparation of our Eighth Programme of Law Reform,[1] it was suggested by Paul Hally of Shepherd & Wedderburn LLP that we should look at the question of "execution in counterpart" in contracts. We were told that this area was causing considerable difficulties for Scottish commercial practitioners in particular, to the extent that for some it was preferable to contract under English law as providing a better solution to the problems. We thought that this made the question one entirely suitable for inclusion in our proposed review of contract law. That the difficulties exist has been confirmed by further comments from other commercial solicitors received since the publication of the Eighth Programme. The issues are clearly associated with the formation of contracts and we have discussed them in depth with our Advisory Group on this Discussion Paper.

6.2 The law reform question may be briefly stated as follows: to what extent may parties wishing to execute a contract in probative (or self-proving) form, i.e. requiring the subscription of all parties upon the contractual document plus the signatures of a witness or witnesses to these signatures along with a testing clause or its equivalent,[2] be able to do so without having to meet in person (or through duly authorised representatives) in order to apply their subscriptions to the contractual document together before a witness or witnesses who also sign? If such a facility would be of value to contracting parties, but is not recognised in the law of Scotland at present, what reform of the law would make it possible?

6.3 Our approach to the whole question necessarily involves examination not only of the law on contract formation and probativity, but also of that relating to communications technology. The latter makes possible the interaction of persons who are physically remote or distant from each other, including the transmission between them of documents and other data as well as "live" audio-visual connection. The technology is already being used in execution in counterpart by remote parties but we think changes in the law already in train may considerably increase the possibilities for this, and point the way to a potentially elegant solution to the present difficulties in Scots law. In this regard, the following provision of the E-Commerce Directive of 2000 still sets the general policy for legal development in this area:

> "Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal

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[1] Scot Law Com No 220, 2010.

[2] We discuss testing clauses (which typically contain details about the witness(es) and date and place of signing) and their equivalents in paras 7.17-7.18.

effectiveness and validity on account of their having been made by electronic means."[3]

6.4 Our starting point in the discussion that follows is the present law; but we take into account, not only our preceding discussion of and proposals on the rules on formation of contract, but also imminent changes to the law that will result from the Land Registration etc. (Scotland) Bill ("LR(S)B") introduced in the Scottish Parliament on 1 December 2011. Part 10 of the LR(S)B contains provisions on electronic documents, the effects of which reach well beyond land registration and conveyancing practice. The LR(S)B builds upon and extends recommendations which we made in our Report on Land Registration, published in February 2010,[4] and bears significantly upon the issues with which this chapter is concerned. We think also that Registers of Scotland ("RoS") may be able to use powers conferred upon the Keeper by the LR(S)B to assist in the provision of one attractive solution to the problems posed by execution in counterpart.[5]

Execution in counterpart in England

6.5 "Execution in counterpart" is a term the origins of which go far back in English legal history.[6] The use of the word "counterpart" may in some senses be anachronistic: *Halsbury's Laws of England* speaks instead of "execution in duplicate"[7] and others refer to "virtual signings or closings".[8] We use "execution in counterpart" because that is the term used by some of those who have alerted us to the difficulties in this area of the law but we do not believe or intend that anything turns on the name. The problem to which the term relates in modern English legal practice arises when parties decide to record their agreement in a single document or set of documents signed by all the parties, to have effect thereafter as the contract between them and with each party having an equally authentic and signed copy or copies of the contractual documentation (which, when assembled in some

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[3] Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1, Art 9(1). The UK has implemented this requirement by way of s 8 of the Electronic Communications Act 2000, permitting modification of domestic enactments, including Acts of Parliament, by subordinate order.

[4] Scot Law Com No 222, 2010.

[5] See Ch 8. On the Bill generally see Peter Nicholson, “Register reborn”, 2012 57(1) JLSS 10, also available at http://www.journalonline.co.uk/Magazine/57-1/1010673.aspx.

[6] In English law a document may be made up of more than one part, each one containing the same text but one of which is regarded as the original one (the principal) and the other (or others) being a counterpart. "When there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy": *Munn v Godbold* 130 ER 526, (1825) 3 Bing 292 at 294 (Best CJ). For a general discussion see the Law Commission of England & Wales' Consultation Paper on The Execution of Deeds and Documents by or on behalf of Bodies Corporate (Law Com No 143, 1996), especially Pt II (the corresponding Report was published in 1998: Law Com No 253). One of the significant differences between a counterpart and the original document is in its evidential value. Best evidence as to the existence and terms of an agreement are found in the original; if it cannot be produced then the counterpart provides next best evidence. A party who signs the counterpart is thereby “estopped from objecting to its admissibility": *Paul, Clerk to Trs v Meek* 148 ER 855 at 856, (1828) 2 Y&J 116 at 119 (Alexander LCB). Drafts or other copies are only considered if all parts of the original document are unavailable: *Villiers v Villiers* 26 ER 444, (1740) 2 Atk 71 (Hardwicke LC). The parts would not necessarily be signed at the same time. A case from the 1820s involving the East India Company (*The East India Company v Lewis* 172 ER 455 at 456, (1828) 3 Car & P 358 at 360 (Lord Tenterden CJ)) illustrates what might happen when parties were in different parts of the world: “…the practice, when the party was abroad, was, for the Company to execute their part, and to send that, together with the unexecuted counterpart, to the governor of the place where the party was; and for the governor, on getting the counterpart executed, to deliver over the Company’s deed to such party; and that upon this it was the duty of the governor to return the counterpart to the East India House.”

[7] *Halsbury’s Laws of England* (4th edn, 2007) reissue, vol 13, para 4.

[8] See fn 19 to para 6.10 below.

overarching file, is frequently referred to in current practice as the "bible" for the particular transaction).

6.6 In certain respects, sales of land seem to have provided something of the model for the approach to execution in counterpart in England. Such sales are carried through by exchange of contracts.[9] Each party to the sale produces and signs a document expressing the contract in identical terms, rather than the "offer" missive followed by the "acceptance" missive familiar to Scots lawyers.[10] "Wet ink" is not the only way in which a document may be validly signed in English law. For example, a printed signature may suffice so long as the party to be bound has shown a recognition of it as its signature; signature by pencil is also sufficient, as is signature on a telegraph form, or by mark, or by initials.[11] It has been suggested by the Law Commission that a facsimile signature can constitute a signature for legal purposes if it is clear that a party so intended.[12] The matter has been expressed thus by Laddie J:

> "[I]t is now possible with standard personal computer equipment and readily available popular word processing software to compose, say, a letter on a computer screen, incorporate within it the author's signature which has been scanned into the computer and is stored in electronic form, and to send the whole document including the signature by fax modem to a remote fax. The fax received at the remote station may well be the only hard copy of the document. It seems to me that such a document has been 'signed' by the author."[13]

6.7 While traditionally the signed "contracts" take effect when physically exchanged by the parties to the contract and/or their solicitors at a meeting, the manner of the exchange may be settled otherwise by the parties, and commonly is in modern practice. For example, exchange can take place by post, in which case the transaction is not finalised until the second document to be dispatched has been received or posted.[14] Exchange can also take place by telephone, in which case parties deposit their respective documents with the other parties' solicitors in advance with the telephone call to confirm the exchange being the condition upon which these documents take full effect.[15] And, it seems, English law's broad view of what amounts to delivery of documents means that exchange may now be by way of appropriate electronic communication such as fax and email transmission.[16]

6.8 The normal practice in commercial as distinct from conveyancing transactions has been for the parties and/or their lawyers to meet together in one place and apply their "wet ink" signatures to the contract documents. For many commercial transactions involving multiple parties this can mean a gathering of a significant number of people to sign a large number of frequently bulky documents, preceded by a process of checking that the

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[9] Law of Property (Miscellaneous Provisions) Act 1989, s 2(1). A useful statement of the law by Stuart-Smith LJ can be found in *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259 at 285 (CA).

[10] We develop the idea that a contract is essentially an agreement (even if not in offer/acceptance form) more fully above at paras 2.6-2.12.

[11] Chitty on Contracts, para 4.034, citing a number of nineteenth-century decisions.

[12] See the Law Commission's Advice, *Electronic Commerce: Formal Requirements in Commercial Transactions* (Dec 2001, available at http://lawcommission.justice.gov.uk/publications/795.htm), paras 3.32-3.33.

[13] *Inland Revenue Commissioners v Conbeer* [1996] BCC 189 at 194.

[14] Chitty on Contracts, para 2.119.

[15] *Domb v Isoz* [1980] Ch 548 (CA).

[16] Exchange by fax has been accepted by Australian courts: *Essington Investments v Regency Property Group* [2003] NSWSC 828.

documents are in good order for the purpose. This checking process is often necessary in complex development and similar transactions because it is only upon the organising solicitor certifying that all the other contracts involved are fit for their purpose and validly executed that the project's funders will execute the funding agreements and release the necessary finance. These checks frequently reveal drafting and typographical errors needing last-minute correction. Arranging such a "signing ceremony" and carrying it through can thus be a time-consuming, expensive and complex process, especially where (as will commonly be the case) the signing parties come from different parts of the country or, indeed, the world.

6.9 However, time and costs can now be saved by arranging a "virtual" rather than a physical signing ceremony, deploying modern communications technology for that purpose. Each party signs the documents at its own chosen place and then transmits a copy of the signed documents electronically – by fax or by email attachment of a PDF for example – to the person who has been previously authorised to manage or coordinate the whole process. As will be explained in more detail below,[17] it is not unusual for the transmission to be of only a completed signature page for a particular document. The process has come to be dubbed "execution in counterpart" because each party ends up with its own signed copy, or counterpart, of the contractual documentation.

6.10 However, there is little or no account of this by that name in the standard works on English contract law that we have been able to consult.[18] Nor has there been much significant case law. Execution in counterpart in commercial transactions seems to have developed as a matter of practice, drawing upon the interpretation of various strands of English law including a wide understanding of what may constitute a legally valid signature, the model provided by the sale of land, general rules on contract formation, the law of agency (in particular the authorisation of parties to sign on behalf of others) and on formalities in contract and the law of deeds. Our understanding of the modern law and practice of execution in counterpart derives largely from a Practice Note issued by the Law Society of England & Wales early in 2010,[19] after possible difficulties surfaced in the case of *R (on the application of Mercury Tax Group Ltd) v HMRC*, decided in 2008.[20] So far as we are aware, however, the validity of the Practice Note recommendations has yet to be tested in court, and we do not know how far the recommendations are followed in practice.

6.11 The Practice Note emphasises first the importance of ensuring that all parties' lawyers have agreed to the proposed arrangements for the virtual signing before the electronic process is to take place. One of the parties' lawyers will generally have to perform a co-ordinating role. It is also necessary for any party distant from the co-ordinating lawyer to ensure that an appropriately authorised person is available remotely (for example, online) in order to receive and approve transmitted documents, sign as required and perform any other requirements for completion.

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[17] See paras 6.12-6.14.

[18] Eg Chitty on Contracts; W E Peel, *Treitel: The Law of Contract* (13th edn, 2011); *Halsbury's Laws of England* (4th edn, 2007) reissue, vol 13 ("Deeds and other instruments").

[19] See "Execution of documents at virtual signings or closings", available at http://www.lawsociety.org.uk/productsandservices/practicenotes/executionofdocs/4447.article. The Practice Note followed the conclusions of a joint working party of the Law Society and the City of London Law Society (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=760&lID=0).

[20] [2008] EWHC 2721 (Admin), discussed at para 6.16.

6.12 While not precluding other possibilities, the Practice Note suggests three options for carrying out a virtual signing process. These are:

1. returning to the coordinator by e-mail the entire document with a signed signature page;

2. returning to the coordinator by e-mail only a signed signature page;

3. creating a pre-signed signature page in advance of finalising the document.

6.13 The first option presupposes an initial sending of the document by the co-ordinating lawyer to the person who has thereafter to sign and return it; the document may already have been signed by the sender and sent either in electronic facsimile or hard copy. The use of the word "counterpart" springs from the likelihood in this scenario that each party holds a copy of the document to which its own "wet ink" signature has been applied.

6.14 The second and third options in the Practice Note, both of which involve sending only signature pages, reflect a perception that in English law attaching pre-signed signature pages to contract documents is a valid means of executing a document to show each signing party's intention to be bound by it. This perception is supported by reference to the decision of the Court of Appeal in *Koenigsblatt v Sweet*.[21] That case involved an exchange of contracts in a sale of land by D to P and his wife. At settlement, the latter's contract was signed only by P. Without authority D's solicitor thereupon altered the contract already signed by D to delete references to P's wife. D subsequently ratified the solicitor's actions and instructed him to proceed but later sought to withdraw. It was held that D's ratification of the altered but previously signed document bound him, and an order of specific performance was granted against him.

6.15 Although clearly rather special on its facts, the *Koenigsblatt* case has been taken to have a wider meaning: so long as a party's signature is applied to a more or less final version of a document, that party can authorise in advance or subsequently ratify its attachment to the final embodiment of the document. This practice also helps to meet a problem that is recurrent in practice, namely late discovery that the text of a document needs alteration or correction. Such alterations or corrections to the initial document can thus be made effective without any need for the addition of authenticating signatures to the alterations themselves.

6.16 This wider understanding of *Koenigsblatt v Sweet* was, however, thrown into some doubt by the first instance decision in *R (on the application of Mercury Tax Group Ltd) v HMRC*.[22] The problem in that case was the validity of attaching to the final version of a written agreement signatures made upon an earlier draft version of the document. Underhill J held that the transfer of a signature page from one document to another was invalid, and that where, as in the particular case, the document was intended to take effect as a deed (the English near-equivalent of a Scottish probative writing[23]), the signature and attestation thereto had to form part of the same physical document. The judge pointed out that in the *Koenigsblatt* case there had only ever been one document, and commented:

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[21] [1923] 2 Ch 314 (CA).
[22] [2008] EWHC 2721 (Admin).
[23] On probative writings in Scots law, see paras 7.16-7.29 below.

"The parties in the present case must be taken to have regarded signature as an essential element in the effectiveness of the documents: that is to be inferred from their form. In such a case I believe that the common understanding is that the document to be signed exists as a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing. The significance of this is not entirely talismanic (though it would not affect my view even if it were): the requirement that a party sign an actual existing authoritative version of the contractual document gives some, albeit not total, protection against fraud or mistake."[24]

6.17 The concerns to which this judgment gave rise are summarised in the Practice Note as (1) the validity of using pre-signed signature pages; and (2) "virtual signings and closings where signature pages are exchanged by email".[25] In particular, was the use of email and scanned versions of signatures or signed documents precluded by the judge's insistence on signature of a physical contractual document?[26]

6.18 The Practice Note considers whether or not each of the previously described modes of execution in counterpart (returning by e-mail the entire document and the signed signature page, returning by e-mail only the signed signature page, or creating a pre-signed signature page in advance of finalising the document)[27] can be applied in four cases:

(1) *the execution of deeds* (formal writing manifesting the intention of its granter to make the document a deed and signed by its granter with attestation,[28] having various legal effects;[29] it may be further noted that again the requirement of signature here does not necessarily involve the application of a name to the deed,[30] and that the additional requirement of delivery by which a document becomes effective is not limited to physical transfer of the signed document between the granter and the grantee);

(2) *"real estate" contracts* (that is, those for the sale or other disposition of a real right in land, where signed writing but not necessarily a deed is required on each side[31]);

(3) *guarantees* (these are important in commercial transactions where a contracting party is a subsidiary, the guarantee being provided by the holding company; in

[24] [2008] EWHC 2721 (Admin) at para 39.
[25] Para 1.2 of the Practice Note.
[26] This has been considered in other cases, such as *Nicholas Prestige Homes v Neal* [2010] EWCA Civ 1552 (estate agency contract held to have been validly concluded by email), *Immingham Storage Company Ltd v Clear Plc* [2011] EWCA Civ 89 (contract for oil storage validly concluded by electronic means, including scanned copy of signed document), and *Green (liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch) (heritable security not concluded, on the facts, by email exchange).
[27] See para 6.12 above.
[28] Law of Property (Miscellaneous Provisions) Act 1989, s 1. There are special rules for execution by companies incorporated under the Companies Acts, and for charities; deeds executed by other parties must be sealed (see Chitty on Contracts, para 1.086). The 1989 Act has been further amended by the Regulatory Reform (Execution of Deeds and Documents) Order 2005 (SI 2005/1906); see Chitty on Contracts, paras 1.090-1.101.
[29] Effects include the absence of a requirement of consideration in respect of any obligation undertaken in the deed; and a limitation period of 12 rather than the usual 6 years in respect of claims for breach of the obligation in the deed. See the Law Commission of England & Wales' Consultation Paper on The Execution of Deeds and Documents by or on behalf of Bodies Corporate (Law Com No 143, 1996), paras 2.8-2.11.
[30] See Law of Property (Miscellaneous Provisions) Act 1989, s 1(4) which provides that “sign”, in relation to an instrument, includes making one’s mark on the instrument and “signature” is to be construed accordingly. Note also s 1(1) abolishing any rule of law restricting the substances upon which a deed may be written.
[31] Law of Property (Miscellaneous Provisions) Act 1989, s 2(1).

English law, unlike Scots law,[32] guarantees must be in writing signed by or on behalf of the guarantor; this also applies to any memorandum or note of the guarantee[33]); and

(4) *simple contracts* (that is, those including neither the sale or disposition of a real right in land, nor a guarantee).

6.19 The Note helpfully sets out in tabular form the extent to which the options may be applied in each of these cases, as follows:

Type of Document	**Option 1 – Return PDF/Word document plus signature page**	**Option 2 – Return signature page only**	**Option 3 – Advance pre-signed signature pages**
Deeds	Yes	No	No
Real estate contracts	Yes	No	No
Guarantees (stand-alone or contained in simple contracts)	Yes	Yes	Yes
Simple contracts (not incorporating any of the above)	Yes	Yes	Yes

We do not have to comment on the soundness or otherwise of these views of current English law (although our discussion of the present law certainly shows why option 1 in the table appears to be valid for all the cases mentioned). What the Practice Note makes clear is the value commercial practitioners in England place on the ability to complete transactions virtually; it also suggests that this is entirely justifiable. Technological development has provided tools of considerable power which may render transacting in business easier and less costly. That the deployment of these tools should not be inhibited by the law has, therefore, been seen as a key policy goal for well over a decade.[34] On the other hand, as Underhill J pointed out in the *Mercury* case, the law must guard itself against becoming open to abuse as an instrument of fraud.

6.20 We note that the Practice Note envisages only the signing of documents by handwritten methods, albeit that in the overall process documents or parts of them signed in

[32] RoW(S)A, s 1(2); in relation to gratuitous obligations in the course of business, see *Royal Bank of Scotland Plc v Wilson* 2004 SC 153, 2003 SLT 910.
[33] Statute of Frauds 1677, s 4.
[34] See para 6.3 above.

this way are electronically transmitted in facsimile between the parties, at least for a "simple contract", by either fax or email attachment. It seems that, for the purposes of execution in counterpart under English law, such an electronically transmitted facsimile signature can suffice if it is clear that by attaching it to a version of a contract document a party intended to become bound by that contract. The only question is the extent to which the protection against fraud and mistake which has hitherto been provided by the process of "wet ink" signing by parties in each other's presence and, in the case of deeds, the presence of witnesses who also signed, can also be provided in the electronic medium. We are not aware of any discussion of the possible use of electronic (as distinct from handwritten) signatures for this purpose in execution in counterpart.

Scots law

6.21 We turn now to Scots law. We have been told that law firms in Scotland take differing approaches to remote signings under Scots law. These are based on varying interpretations of the rules relating to contract formation; the effect of the presumptions in RoW(S)A where (as is apparently common practice even when the contract does not involve land) it is recorded in a document subscribed by all parties before witnesses (designated as such in a testing clause or its equivalent) who also sign, so giving the document probative status; and uncertainties about the law on delivery of documents.[35] As we have already noted, these uncertainties are sufficient to lead some to make English law the governing law of the transaction in order to deploy the apparently more flexible system described above. While we note that the English law in this area is by no means clear either, we think it unfortunate if Scots law is seen as making otherwise perfectly legitimate business dealings in any way more difficult than necessary. We have been told that "increasingly [commercial] parties do not even meet to negotiate the contracts, never mind sign them."[36] The general policy of the law in this area, as Lord Guthrie pointed out, is to facilitate commercial transactions and not to create obstacles or unnecessary pitfalls in the way of solving practical problems arising out of the circumstances confronting business people.[37] Our approach to the problem is driven by this consideration above all.

Contract as agreement

6.22 As was discussed in Chapter 2, the master concept of contract in Scots law is that of an "agreement between two or more parties … intended to establish, regulate, alter or extinguish a legal relationship and which gives rise to obligations and has other effects, even in respect of one party only".[38] Such agreement may be demonstrated in various ways, including by way of an exchange between the parties of an offer and an acceptance thereof. Another possibility, the one with which this chapter is principally concerned, is where the parties agree to put their contract into a single document or set of documents to be signed (normally subscribed, that is, placed at the foot of the document's final page) by each of the parties. But the problem of "execution in counterpart" arises when the parties are in different locations, albeit each with access to a print-out of the contract, and able to subscribe that copy and to transmit it electronically (by fax or by email attachment of a scanned version) to

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[35] On delivery see paras 7.2-7.15 below.
[36] Quotation from an email sent to the Commission by Paul Hally, Partner, Shepherd & Wedderburn LLP, on 4 August 2009.
[37] *R & J Dempster Ltd v Motherwell Bridge and Engineering Co Ltd* 1964 SC 308 at 332 (IH).
[38] See McBryde, *Contract*, para 1.03, citing H McGregor, *European Code of Contract*, (2004) 8(3) Supp (European Code of Contract) Edin LR, 1-89.

emerge at the other end as a facsimile of the signed copy. Will this be enough for the parties to have a contract and, if the contract so provides, for each party's set of documents to have full contractual force?

6.23 Scots law in general has no difficulty in allowing contracts where formal writing is not required to be formed by way of electronic transmission of whatever writings they have chosen to use.[39] Hence, for example, a commercial contract for the sale of goods has been held concluded by an exchange of emails, each clearly an electronic writing electronically transmitted.[40] There seems to be no doubt that an internet-based automated system for ordering goods or booking services (such as those offered by Amazon and Easyjet)[41] could provide a further instance of this should an appropriate case arise for decision under Scots law. But the exchange of writings involved in the transaction described in the previous paragraph is not easily fitted into the structure of offer and acceptance. The mere fact that the writings signed and exchanged by the parties are expressed in substantively identical terms is not enough. The offer and acceptance model requires a sequence of events, with the acceptance following and being made after communication to the acceptor of the terms of the offer. For this reason cross-offers have been held not to constitute a contract in *Tinn v Hoffmann*, an English case cited without adverse comment in most Scottish contract texts.[42]

6.24 It is significant in *Tinn v Hoffmann*, however, that each of the parties was unaware of the other's offer at the time its own was sent. This would not hold good in the scenario which we are considering, since (like the "exchange of contracts" recognised as constituting a contract for the sale of land in English law), normally this involves prior arrangements between the parties precisely for the purpose of completion of a contract between them. And, while it is not an orthodox mode of acceptance simply to communicate back to the offeror words identical to those of the offer, doing so certainly could not be said to be a rejection of the offer. It might be possible to meet the communication requirement even more quickly than by use of electronic transmission of the documents, by parties being in contact with each other by way of telephone, video conference call or Skype[43] as each signed its version of the contract.

6.25 The simplest point of all in favour of the outcome of such a process of "execution in counterpart" being a contract, however, is that it is unnecessary to force the formation of every contract into the offer and acceptance model. What is required is agreement between parties with the requisite intention to be bound, or for their agreement to have legal effect, as a contract. It is manifest that the parties to a transaction completed by way of an exchange of identical writings each signed by its sender are in such agreement. Were the tentative proposal made in Chapter 2 – that a legislative restatement of the Scots law on formation of contract include a provision stating that contracts may be formed in ways other than offer

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[39] See eg *Wyman-Gordon Ltd v Proclad International Ltd* 2011 SC 338 (IH); *George Wimpey West Scotland Ltd v Henderson* 2011 GWD 40-829 (Sh Ct).

[40] *Baillie Estates Ltd v Du Pont (UK) Ltd* 2010 SCLR 192 (IH). Indeed, as will be shown below (at paras 8.30-8.45), the emails can also be regarded as electronically signed, albeit most likely as a simple rather than as an advanced electronic signature. This question was also considered in English law, in relation to a purported loan agreement, in *Green (liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch).

[41] However, Amazon contracts under Luxembourg law and Easyjet under English law: see our response of 19 Nov 2010 to the MoJ's Call for Evidence and Views on the EC's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, available at http://www.scotlawcom.gov.uk/download_file/view/589/329/.

[42] *Tinn v Hoffmann & Co* (1873) 29 LT 271, cited in Walker, *Contracts*, para 7.43; McBryde, *Contract*, para 6.33; MacQueen & Thomson, *Contract*, para 2.18; SME, Vol 15, para 634. It is not referred to in Gloag on Contract.

[43] An internet video telephone service.

and acceptance so long as it is clear that the parties have reached a sufficient agreement which they intend to have legal effect – to be implemented in legislation, it would reinforce this position very powerfully.

6.26 This argument from principle can be reinforced with direct authority, albeit surprisingly old. The early eighteenth-century case of *Smith v Duke of Gordon* held that (in the words of a side note to the report) "if a mutual contract is executed by two counterparts, it is sufficient if each party subscribes the paper containing what is prestable on himself".[44] In 1684 the Duke engaged Robert Smith to serve him and his family "in chirurgery and physic, and also to supervise his buildings and architecture". The salary was 200 merks a year plus board when the Duke was at home and a daily subsistence allowance otherwise. Smith and the Duke had each signed a copy of their agreement, then exchanged these copies. Later Smith obtained decree from the Sheriff at Edinburgh against the Duke for non-payment of 2,823 pounds Scots due under the contract.[45] The Duke sought to suspend the decree on the basis that "by the contract produced by the charger himself, it appears, the clause pursued on is a marginal note, and which, not being subscribed by the Duke, but only by Smith himself, can never oblige the Duke." The court held, however, "that mutual contracts having two doubles need not be subscribed by both parties-contracters, but it was sufficient in law if the Duke's principal was signed by Smith and his counterpart by the Duke." An earlier decision said to be to the same effect, *Sinclair of Ossory in Caithness*,[46] was cited by the court, which "therefore sustained the marginal note, though not signed by the Duke, seeing it was contained in his own double uncancelled."

6.27 *Smith v Duke of Gordon* was followed in the much more recent sheriff court case of *Wilson v Fenton Bros (Glasgow) Ltd*.[47] This involved the exchange by the parties of duplicates of a patent licence agreement, each party signing one copy and then handing that copy over to the other. It was held that the licence agreement had been validly executed, and the sheriff-substitute (J C E Hay) said:

> "In my view, the documents produced and to which I have referred, establish the fact of a completed agreement between the pursuers and the defenders …The form of the agreement is not a usual one in Scotland, but, as all the negotiations were conducted in England, the method of having two copies, of which one copy is signed by each party and delivered to the other party, was adopted in conformity, as I am informed, with a common practice in England."[48]

6.28 These judicial recognitions of execution in counterpart confirm the argument of principle that such a process can form a contract in Scots law. But neither case discusses the application on its facts of the Scots law on delivery of documents, probably because in both a physical exchange of the documents had clearly actually taken place between the parties, since each was in undoubted possession of the document signed by the other. But this is not the case in the scenario with which we began our discussion, in which the parties transmitted their signed documents to each other electronically. In English law delivery (or an equivalent) of the respective "contracts" is a necessary step before a completed contract

[44] *Smith v Duke of Gordon* (1701) Mor 16987. The case of *Cubbison v Cubbison* (1716) Mor 16988 also involves "doubles of a writ", and in that case there were three such doubles.
[45] A merk was worth 2/3 of a pound Scots, itself valued in 1707 at one-twelfth of a pound sterling.
[46] We have so far been unable to trace any report of this case.
[47] 1957 SLT (Sh Ct) 3.
[48] Ibid at 5.

comes into existence between the parties; but delivery may be by electronic means.[49] In the next chapter we will discuss the extent to which the same holds good in Scots law, also bearing in mind our discussion in Chapter 2 of the general rule of contract formation, that in general it is enough for the effectiveness of statements intended to lead to a contract that they have been communicated to, in the sense of having reached, their intended recipients.

6.29 We note finally in this section that the contract produced by the process of execution in counterpart discussed in this section will probably not be in the probative form that we understand parties generally wish it to have. As we will show in the next chapter in more detail, that may be possible for the purely hard copy and physical delivery transaction such as is illustrated by *Smith v Duke of Gordon* and *Wilson v Fenton Bros (Glasgow) Ltd* if each party executes its document in probative form. But once again the electronic transmission of documents which are reproduced at the recipient's end in either electronic or (if downloaded and printed) hard copy may mean in the law as it currently stands that such copy does not have probative status even if the original did so, with potential resultant problems. This issue will also be addressed in more detail in the next chapter.

[49] See para 6.7 above.

Chapter 7 Delivery, Probativity and Related Matters

Introduction

7.1 Before we turn to our main law reform proposals in relation to execution in counterpart, this chapter discusses, in outline, a number of areas of the law which touch on and affect the formation of contract. The first of these are (i) delivery of documents and (ii) probativity. Each of these has been at least implicit in what has already been discussed, and here we draw out their significance more fully. We then turn to the twin topics of (iii) electronic signatures, both simple and advanced, and (iv) electronic execution of electronic documents, which have importance in relation to probativity in particular. Next, we discuss (v) making alterations to both traditional paper and electronic documents in both probative and non-probative form; then, lastly, (vi) the use of signature pages. There may be some need for modest reforms in all of these areas which could smooth the path of execution in counterpart, going alongside the more radical measure for a better alternative suggested in the final chapter.

Delivery of documents

7.2 Scots law has important, if occasionally overlooked, rules on when writings embodying or constituting obligations become effective. The basic principle was classically stated in the eighteenth century by the institutional writer, Erskine, as follows:

> "A writing, while it is in the granter's own custody, is not obligatory; for as long as it is in his own power, he cannot be said to have come to a final resolution of obliging himself by it."[1]

7.3 In other words, with written obligations, it is not enough to communicate to the beneficiary of the writing that it has been made; there must also be delivery of the writing to the beneficiary. The famous example is the seventeenth-century case of *Stamfield's Creditors v Scot's Children*,[2] where the granter of an assignation had intimated to the assignee that the document had been signed and awaited collection; but before that could take place the granter was found murdered with the signed document beside him. It was held that since the document had not been delivered it was ineffective. Intention to deliver did not meet the requirement of delivery.

7.4 Not all contracts require delivery, however. There is an important distinction in this regard between unilateral contracts and mutual ones: where a mutual contract has been reduced to writing in a single document signed by all parties to it, there is no need for

[1] Erskine, *Institute*, III, ii, 43.
[2] (1696) IV Bro Supp 344.

physical delivery of the document between the parties.[3] The underlying principle was well stated by Erskine:

> "Mutual obligations or contracts signed by two or more parties for their different interests require no delivery … because every such deed, the moment it is executed, becomes a common right to all the contractors. The bare subscription of the several parties proves the delivery of the deed by the other subscribers to him in whose hands it appears; and if that party can use it as a deed effectual to himself it must also be effectual to the rest."[4]

This means that the requirement of delivery has its greatest practical impact on unilateral obligations and those mutual obligations which are set out in multiple copies of the contract each of which is signed by the granter and then exchanged between the parties (as distinct from mutual obligations which are executed by all parties signing a single document – which we term an "all parties signing ceremony").[5] Our principal concern in this Discussion Paper is with mutual contracts and, as they have been typically executed at an all parties signing ceremony, the rules on delivery of documents are only relevant to that extent.

7.5 It has been held in *Robertson's Trustees v Lindsay*[6] that this principle also covers mutual documents executed in duplicate. Unfortunately for present purposes, the authority of that decision does not appear to eliminate the possible need for delivery where the process of execution in counterpart involves simply a signing by each party of its own copy of the document in question, as in the cases of *Smith v Duke of Gordon* and *Wilson v Fenton Bros (Glasgow) Ltd*, discussed in the previous chapter.[7] The duplicate leases in *Robertson's Trustees v Lindsay* were each signed by both parties, indeed were probative in that the subscriptions of the parties bore to be witnessed and the documents carried testing clauses.[8] The duplicates were not held by either party but by an agent for the landlord, who refused to hand one of them over to the tenant unless the latter found security for the fulfilment of his obligations under the lease. When the dispute reached the court, the landlord argued that the lack of delivery of a document to the tenant meant there was anyway no contract. This argument was rejected by the court, with Lord President Inglis declaring:

> "The whole argument for the landlord proceeds on a wrong idea of the law of delivery. In the ordinary case mutual contracts do not require delivery. Whoever holds the document holds it for all the parties and against all the parties."[9]

7.6 Further difficulties for execution in counterpart between remote parties arise from the limited flexibility so far afforded by Scots law in providing alternatives to actual transfer of possession of the document.[10] Delivery by post takes effect no earlier than upon the document's arrival at its destination.[11] There may be delivery to or by third parties such as a solicitor. Registration of the writing, typically in the Books of Council and Session or sheriff

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[3] McBryde, *Contract*, paras 4.44-4.69.
[4] Erskine, *Institute*, III, ii, 44.
[5] McBryde, *Contract*, paras 4.32-4.43, discusses the significance of the delivery principle in the law of *jus quaesitum tertio*.
[6] (1873) 1 R 323 (IH).
[7] *Smith v Duke of Gordon* (1701) Mor 16987 and *Wilson v Fenton Bros (Glasgow) Ltd* 1957 SLT (Sh Ct) 3; see paras 6.26-6.27 above.
[8] On probativity see paras 7.16-7.29 below.
[9] (1873) 1 R 323 at 326.
[10] See McBryde, *Contract*, paras 4.12-4.31; Gloag, *Contract*, pp 71-76.
[11] McBryde, *Contract*, paras 4.19-4.20, citing *Dowie & Co v Tennant* (1891) 18 R 986 (IH).

court books, may suffice. But the *Stamfield* case referred to above[12] makes it unlikely that telephone calls confirming that a document had been signed and could be collected by, or had been posted to, the beneficiary, would be treated as delivery.

7.7 Above all, in relation to modern execution in counterpart, the authorities on whether electronic transmission of obligatory writings amounts to delivery are not consistent or clear.[13] Without reference to any authority, McBryde suggests that "[t]ransmission of a copy of the [document] could be intimation that the [document] is to be regarded as delivered",[14] so long as there is sufficient evidence of intention to treat the document as thereby delivered. That apparently would not include the case where the document is to be treated as a draft or as a communication for information only.[15] In the case of contracts relating to land, where the current law requires formal signed writing to the exclusion of digital or electronic writing, there are conflicting decisions on whether transmission of a copy by way of fax is delivery of the document.[16] The position probably is that the actual writing must be delivered physically in such cases, and that transmission by fax or email attachment is not enough.

Electronic delivery: 'electronic documents' and 'traditional documents'

7.8 Fortunately, the Land Registration etc. (Scotland) Bill ("LR(S)B"), introduced in the Scottish Parliament on 1 December 2011, contains provisions in this regard, implementing recommendations made in our Report on Land Registration published in 2010.[17] Under a proposed new section 9F(1) of RoW(S)A, an electronic document may be delivered electronically "or by such other means as are reasonably practicable".[18] New section 9F(2) goes on:

> "But such a document must be in a form, and such delivery must be by a means –
>
> > (a) the intended recipient has agreed to accept, or
> >
> > (b) which it is reasonable in all the circumstances for the intended recipient to accept."[19]

7.9 The Bill defines "electronic documents" as "documents which, rather than being written on paper, parchment or some other similar tangible surface are created in electronic form".[20] As this definition already hints, electronic documents are to be contrasted with what the Bill calls "traditional documents", that is, "documents written on paper, parchment or some similar tangible surface".[21] It is also to be noted that under the Bill as introduced electronic documents are "created" in electronic form, whereas traditional documents are "written" on paper or some other similar tangible form. Since most documents intended to

[12] See para 7.3.
[13] The position of land contracts is discussed in our Report on Land Registration, Vol 1 (Scot Law Com No 222, 2010), paras 34.55-34.57.
[14] McBryde, *Contract*, para 4.12.
[15] Ibid.
[16] *EAE (RT) Ltd v EAE Property Ltd* 1994 SLT 627 (OH); *Merrick Homes Ltd v Duff* 1996 SC 497 (IH); *Signet Group Plc v C&J Clark Retail Properties Ltd* 1996 SC 444 (IH); *McIntosh v Alam* 1998 SLT (Sh Ct) 19; *Park, Petrs* 2009 SLT 871 (OH). See also para 4.9 above.
[17] Scot Law Com No 222.
[18] LR(S)B, s 93(2), introducing a new Part 3 ("Electronic Documents") into RoW(S)A.
[19] Ibid.
[20] Ibid. The quoted definition forms part of proposed new s 9A of RoW(S)A.
[21] See s 94 of and sch 3 to the LR(S)B, inserting a new Pt 2 ("Traditional Documents") into RoW(S)A. The quoted definition forms part of a proposed new s 1A of RoW(S)A.

have legal effects are today at least initially prepared electronically upon computer systems, all such writings are at least capable of becoming electronic documents under the new law. They are also capable, however, of becoming traditional documents if printed out from the electronic file and appropriate steps are then taken to give that print out legal effectiveness in some form or another, by handwritten signatures of parties and witnesses, if required. Which kind of document the writing is for legal purposes will therefore generally be decided, we think, at the point of its execution, whether traditional or electronic, rather than by the medium in which it happens at any other point to be recorded.[22]

7.10 The divide between the traditional and the electronic document thus established by the Bill may in practice be less clear-cut. The traditional document can be found in digital as well as its hard copy form, whether as an initial word processed file or, more significantly for present purposes, as a Portable Document File (PDF) made later by machine-scanning or otherwise converting the document print-out. This can of course be transmitted electronically between parties by way of email attachment or by fax, whether using a dedicated fax machine or a computer which embodies fax technology.

7.11 The important scenario is where the document in its traditional form was signed by the party to be bound by it, and a digital copy was made of the signed document, whether as a fax or a PDF. It could be argued that the electronic process involved here is not one of *creating*, as the Bill specifies, but rather merely one of copying and transmitting a pre-existing traditional document. The fax or the PDF is thus not an electronic document in terms of the Bill; and if so, then it cannot be delivered electronically, and its electronic transmission cannot effect delivery so as to give the document legal force. Where delivery as distinct from communication is necessary, traditional documents can still only be delivered by traditional means.

7.12 This interpretation is open to debate. We ourselves did not identify the issue in our Report on Land Registration, which accordingly throws no particular light on what the correct understanding of the boundary between the traditional and the electronic document should be beyond the medium of its recording, and on the porous-ness of that boundary for the purposes of the law. It could certainly be argued persuasively that the medium is indeed all that matters and that a document in digital form is an electronic one even if the digital record is but a copy of a traditional one that continues to exist in its own medium. The document can therefore be delivered electronically in its electronic form. But if the legal effect of the document depends in some way upon its execution (for example, its probativity, as we will discuss later in this chapter)[23] then what is delivered electronically may not match the requirements of the law in that particular regard. We think that this would make for an impediment to the legal effectiveness of perfectly reasonable and common ways of doing business, and that any doubt there may be should be laid to rest in legislation rather than await the uncertain outcomes of possible litigation in the future.

7.13 In sum, it seems from this discussion that when a traditional all parties signing ceremony is held in relation to a commercial transaction, there is no need for any form of delivery of the various documents once they have been signed.[24] The position is different, however, when the parties are signing copies of the documents remotely. Delivery is then

[22] We explain the concept of electronic signature below at paras 7.30-7.45.
[23] See paras 7.16-7.29 below.
[24] See para 7.4 above.

required and, even with the LR(S)B's recognition of electronic delivery, electronic transmission of copies of the signed paper documents may, on a possible reading of the Bill, not achieve this. This result would, we think, be unfortunate and inconsistent with the policy that the law of contract should not impose un-necessary obstacles to the reasonable expectations of business people and their professional advisers.

7.14 An attraction of the reform of the law of delivery put forward in the proposed section 9F of RoW(S)A[25] is that it permits electronic transmission to be delivery rather than saying that it is delivery in all cases. It opens up the possibility of other new forms of delivery that are "reasonably practicable". And it subjects these possibilities to the alternatives of the parties' agreement or what it is reasonable in all the circumstances for the recipient of the document to accept. With these controls in place, there is no obvious reason why the rule should not apply to traditional as to electronic documents; and with that Scots law in this area would have moved a long way towards achieving the flexibility and relative responsiveness of English law to modern business needs and possibilities, especially in the context of execution in counterpart. In particular, parties could agree that after an electronic transmission each other's counterpart would be held by its sender as delivered to the other party or parties involved. While our principal concern is with the completion of commercial contracts (where we think the freedom of parties to determine upon electronic or other reasonably practicable forms of delivery of documents other than physical transfer thereof will be highly attractive), we do not think that the proposal being made here would undermine the requirement of delivery in the other contexts where it is important. If we are mistaken in this belief, we will of course be grateful for any guidance that we are given on more appropriate solutions to the problems.

7.15 We accordingly propose:

41. For the avoidance of doubt, the new section 9F of the Requirements of Writing (Scotland) Act 1995, which will allow electronic documents to be delivered electronically or by such other means as are reasonably practicable, subject to the intended recipient's agreement or what it is reasonable in all the circumstances for the intended recipient to accept, should be extended to cover all documents, including traditional ones, and not restricted to electronic ones.

Probativity: the present law

7.16 As mentioned in the preceding chapter, we have been told that it is standard practice during the completion of high value commercial contract completions for the documents embodying the contract to be executed in a way that gives the documents probative (or self-proving) status.[26] This can be done if the party or parties to be bound by the document sign it in a particular fashion. The signature or signatures must be placed at the end of the substantive text of the document, i.e. be a subscription or subscriptions. In addition, the document must carry a testing clause or its equivalent and bear to have been signed by a person or persons as witness to the parties' signatures. By convention (rather than as the result of any specific requirement) the witness generally signs at the end of the document to

[25] See para 7.8 above.
[26] See para 6.21 above.

the left of the subscription, at least in conveyancing deeds.[27] The document so subscribed and signed becomes probative, or self-proving.

7.17 Before turning to the effects of probativity it is worth briefly discussing what a testing clause is and why it may be included.[28] Its main purpose is to record particulars of execution, but a secondary purpose is to mention any alterations which have been made prior to signature. Such a clause "or its equivalent" (and apart from certain land contracts it is almost invariably an "equivalent" which is used in modern practice[29]) is required by section 3 of RoW(S)A if a document is to be probative. Section 10 of that Act allows the Scottish Ministers to prescribe a form of testing clause, though it would not be mandatory to use it. But in any event this power has not been exercised, meaning that it is up to parties themselves to determine what form their testing clause will take, should they decide to use one. In practice, it is a statement, inserted once the document has been executed,[30] which begins something like this: "IN WITNESS WHEREOF these presents consisting of this and the three preceding pages and the inventory annexed and signed as relative hereto are subscribed …" and then there are details of the signatories, including the witness(es). It is a requirement for probativity that the name and address of any witness are specified, and it is common that the date and place of signing are also included.

7.18 Our understanding is that testing clauses in the sense described above are no longer generally used other than for dispositions of land and standard securities in residential conveyancing transactions. Instead, and particularly in commercial practice, an equivalent to a testing clause is used. As mentioned directly above, RoW(S)A offers parties the choice of using a "testing clause or its equivalent" if they want the document to be probative.[31] Provided that the name and address of any witness is recorded close to his or her signature this will suffice to make the document probative. Details of the date and place of signing may also be added (in which case there is a presumption that the document was subscribed on that date and in that place).[32] A sample signing page which meets these requirements is as follows:[33]

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[27] Gretton and Reid, *Conveyancing* (4th edn, 2011), para 17.05.
[28] On testing clauses see generally SME, Conveyancing (Reissue, 2005), para 46; and see also Euan Sinclair and Ann Stewart, *Conveyancing Practice in Scotland* (6th edn, 2011), para 11.03.
[29] The exception is where there have been alterations, interlineations or erasures made before signing. These can then be described in the testing clause to establish what was in the document at the point of signature. See further paras 7.46-7.56.
[30] It cannot be inserted in advance of signature as it is a narrative, albeit a formalised one, of what happened at the time of signing. Oddly, however, it is invariably added above the signatures. Where an equivalent to a testing clause is used it is standard for the details of the witness(es) to be added *below* the signature(s). Historically, the placing of the testing clause above the signatures was to comply with the Subscription of Deeds Act 1681, which required the witnesses' designations to be "in the body of the writ", but this requirement was abolished by s 38 of the Conveyancing (Scotland) Act 1874.
[31] See para 7.17 and RoW(S)A, s 3.
[32] See RoW(S)A, s 3(8).
[33] We are grateful to Dr Ross G Anderson of the University of Glasgow for this style.

In WITNESS WHEREOF this Agreement comprising of this and one preceding page is executed as follows:

For and on behalf of the Transferor:	In the presence of this witness:
………………………………. (Director)	……………………………….. (Signature)
………………………………. (Print Name)	………………………………… (Print Name)
………………………………. (Address)	………………………………… (Address)
……………………………….	…………………………………
Date…………………………	Date…………………………
At: ………………………….	At: ………………………….

7.19 We now turn to the effect of probativity. First, the document in question will be presumed to have been subscribed by the persons by whom it bears to be subscribed, and on the date and at the place set out in the document or its testing clause or equivalent.[34] It is in this way that the form of the document is proof or evidence that it is what it purports to be. In any dispute about the document's authenticity, the burden of contrary proof is at once thrown on the party contending that the document is not what it bears to be. This may obviously be important in any litigation about the document or the matters to which it relates, or where the transaction is long-term in nature, or where (as in a will) the document is not likely to take effect until some significantly later time, or for matters such as taxation and prescription[35]. There are also some important presumptions in relation to alterations to probative documents provided that they themselves are executed in appropriate fashion. These will be discussed further below.[36]

7.20 The probativity of a document, it has been said, is all about appearance:

> "Whether a document is probative is determined by visual inspection. Either it looks valid or does not. For probativity, looks are everything. Recourse to extrinsic evidence is not permitted. The judgment must be made by looking at the deed alone. And the judgment must be made. No sitting on the fence is permissible. There is no such thing as (as is often suggested in exam answers) a document which is presumed to be probative. Either it is probative or it is not. …

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[34] RoW(S)A, s 3(1) and (8). Note that s 3(6) envisages the possibility of a person being witness to the subscription of more than one granter and allows such witnessing to be regarded as a continuous process even if the witness does not sign until each of the granters has subscribed or acknowledged its subscription. Section 7(5) of RoW(S)A states that it is unnecessary for a witness witnessing the signature of more than one granter to sign the document more than once.

[35] An advantage which once existed for obligations recorded in probative writing, namely that they were subject only to the long negative prescriptive period of 20 years (as opposed to the short negative prescription period of 5 years), was removed by RoW(S)A, Sch 5. The long negative prescription period continues to apply, however, to obligations relating to land, see the Prescription and Limitation (Scotland) Act 1973, Sch 1, para 2(e). As noted in David Johnston, *Prescription and Limitation of Actions* (1999), para 6.51, since obligations relating to land form "a substantial sub-set of probative writs", the effect of the repeal of the former law is limited to those cases where the contract is put into probative writing without that being made necessary by the law. As Johnston also notes (ibid, para 6.49), "the law was interpreted by the courts in such a way that obligations (for example) to pay damages for breach of an obligation constituted in a probative writ were not regarded as constituted or evidenced by that writ, and so did not fall within the terms of paragraph 2(c) [of Sch 1 to the 1973 Act]."

[36] See paras 7.46-7.56.

> This means that if a fault in executing or witnessing cannot be determined by visual inspection, the document is still probative. A forged deed will be probative, unless the forgery is apparent, which is unlikely … If the subscription and witnessing are not one continuous process, the document will still be probative, unless the gap in time is revealed on the face of the deed. … [T]he document is probative if it *bears* to have been validly subscribed and witnessed."[37]

7.21 A further benefit of a probative document is that, if it contains an appropriate consent clause, it may be registered for preservation and/or execution (in the sense of enforcement) in the Books of Council and Session.[38] Wills are an example of documents made probative so that they can be preserved in this way against the risk of loss or destruction of the initial document.[39] Again, should a debt due under a contract not be paid in time, registration (which can be carried out at any time after the execution of the document) enables the creditor to move to enforcement by way of summary diligence without any prior need to raise a court action and obtain decree against the debtor.[40]

7.22 On the other hand, although a document is presumed to be valid if it is probative, no contract needs to be in probative form to be binding and effective. Probativity is essentially about the evidential status to be afforded to documents meeting the requirements of the law in this regard. Even where there are requirements of writing before a contract is formed (i.e. under RoW(S)A, in land transactions and gratuitous unilateral obligations not undertaken in the course of business[41]), all that the law demands is subscription by the party or parties to be bound. The formal validity of a contract in this regard does not depend on the document in question having been executed in probative form. Probativity is essentially a matter of choice for the party or parties to a document. It is for these parties to determine whether or not they need or want the benefits conferred by probativity.

7.23 Signing a legal document, and in particular one that is known to be contractual, is generally well understood as committing the signatory to whatever the legal effects of the document may be, even where there is no legal requirement of signature or, indeed, writing for the effect in question to be achieved.[42] Signature by a party in the form of subscription is the key to the formal validity of those contracts for which under RoW(S)A the use of writing is necessary. It is also one of the essentials for probativity, along with the signature of a witness to any subscription and a testing clause or its equivalent. But there are limitations upon what will constitute an effective signature by a granter for purposes of probativity by comparison with what is needed for formal validity.

7.24 For a document to be probative under RoW(S)A its subscription will normally include the signatory's forename and/or initial followed by surname (for example, Thomas B Smith), although an abbreviated or familiar form of a forename may be used as part of this (such as,

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[37] George L Gretton & Andrew J M Steven, *Property Trusts and Succession* (2009), paras 30.32-30.33.
[38] RoW(S)A, s 6.
[39] However, at present, registration of a will is usually done by the executor when winding up the estate. During a testator’s lifetime, wills tend to be stored by the testator or, if prepared by a solicitor, in a solicitor’s office.
[40] On summary diligence see Gloag & Henderson, para 49.01.
[41] RoW(S)A, s 1(2).
[42] McBryde, *Contract*, para 6.12. See also the criticisms of *Harvey v Smith* (1904) 6 F 511 (IH) in McBryde, *Contract*, para 6.13 and in Gloag, *Contract*, p 96. Signatures are, of course, used in other contexts, with variable legal effects: eg to take responsibility for the contents of a manuscript, as in an examination script book; to make a claim of ownership of a book on its flyleaf; to confirm the correctness of the minutes of a meeting or of an organisation’s accounts; to declare one’s presence at a particular place, as in a visitor’s book; or simply to provide another person with one’s autograph or with greetings (as in a birthday or Christmas card or a book of condolence).

Tom Smith).[43] Scots law in this area generally appears to be more restrictive than English law which, for example, does not require that the signature to a deed (the nearest equivalent to a probative document) be a name.[44] RoW(S)A does not, however, expressly limit a signature for these purposes to something written by pen and in ink: so can it be, as in England,[45] in pencil, typed or printed?

7.25 The prime characteristic of a probative document is indeed its self-proving status, so that there is no need for evidence of valid signature beyond what the document itself provides. There may be a question whether a pencilled and so relatively easily erased subscription can really manifest the signatory's commitment to the document; but the answer is that it is for the other party to show that lack of final intention, not for the signatory to prove its existence.[46] The document has the appearance of probativity, given that RoW(S)A makes no requirement of pen and ink. The inherent distinctiveness of a holograph signature (in ink or pencil) is certainly important here; but that is not something impossible also to parallel in typing, print or facsimile: for example, with a statement in the text of the document that it is so subscribed by or on behalf of a particular party or, perhaps, if a typed or perhaps even a facsimile signature meeting the content requirements set out above were to be preceded by the words "Signed" or "Signature", and if the granter acknowledged this signature to a witness who also signs, with that being set out in a testing clause or its equivalent.[47] The key point again in such cases would be that the burden of proof thereafter would fall on the party seeking to show that such typed, printed, or facsimile subscription is not in fact the relevant party's signature. The limits of the means by which a subscription may be rendered thus lie in the medium – paper or equivalent – upon which the document itself is recorded. This apart, content rather than the means by which the subscription appears on the page is what matters for probativity.

7.26 RoW(S)A allows the following to be a valid signature where only formal validity is required:

- a name which is not the signatory's full name (e.g. the forename Tom standing without a surname),
- a description (e.g. Mum),
- an initial (e.g. TBS) or
- a mark (e.g. X),

if (1) these are the person's usual method of signing, whether generally or only for documents of the kind in question; or (2) if the person intended it to be a signature of the document.[48]

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[43] RoW(S)A, s 7(2). See further, George L Gretton and Kenneth G C Reid, *Conveyancing* (4th edn, 2011), para 17.04.
[44] See para 6.6 above.
[45] Ibid.
[46] The position would be different, however, if the issue was whether or not a party's pencilled subscription had subsequently been erased so that as it stood the document appeared to be unsubscribed. On its face the document would not be probative in relation to that party.
[47] As in *McBeath's Trs v McBeath* 1935 SC 471 (IH, seven Judges), where a will was held to be holograph although typed by the testator (including the phrase 'adopted as holograph' above the testator's signature at the end of the document), typing being his method of writing. See also *Chisholm v Chisholm* 1949 SC 434 (OH) where the will itself stated that it had been typed by the granter. For a discussion of this topic see Kenneth Reid, "Testamentary Formalities in Scotland" in Kenneth Reid, Marius J de Waal and Reinhard Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011), vol 1, pp 405-431.
[48] RoW(S)A, s 7(2)(c).

The key point which emerges from this for present purposes is that such signatures lack the content needed to meet the requirements of probativity.

7.27 It also seems on the authorities that where formal validity is required – that is, principally in land transactions – the signature must be "wet ink" or equivalent, and that as a general rule facsimiles of signatures will not do. Under the present law, for example, a faxed acceptance missive has been held not to be a way in which a contract for the sale of land can be concluded; only the arrival of the original signed document with the offeror could have that effect.[49] If this is right, it must also apply to the subscription needed for probativity, since it would be illogical if the requirements for formal validity were in this respect more demanding than for probativity. Scots law once again appears more demanding than English law; although it is possible that here English law is too lax and provides insufficient safeguards against fraud or error.[50] In the light of the reforms proposed by the LR(S)B, to be discussed further below, [51] we make no further comment on this at this point.

7.28 If a written contract is to be made probative, the document in which it is recorded must be subscribed by all the parties in the required form; but it is possible for only one witness to sign in respect of all these subscriptions.[52] RoW(S)A allows for formation of contracts requiring formal validity by way of written offer and written acceptance subscribed by the offeror and the acceptor respectively. In practice the offer and acceptance are usually each made probative, with a different witness signing in respect of the two subscriptions;[53] there is no doubt that the result is a contract embodied in probative form. The same conclusion would hold good, we suggest, in the situation where each party executed counterpart contractual documents in probative form and performed whatever further exchange of these documents the law requires and permits for the parties to be bound by a contract between them. If the exchange was electronically performed, as previously discussed, the parties could agree that the probative documents so transmitted would be held by each sender as delivered to the other party or parties.[54] Given the uncertainties which exist about execution in counterpart in Scots law, however, it might be useful if this particular point was made clear by legislative provision. We accordingly ask:

> **42. Should it be made clear by legislative provision that an exchange of counterpart contractual documents can satisfy the requirements of formal validity and probativity if each document is appropriately executed by the respective parties to the exchange who further, where the documents are electronically delivered, also agree to hold the originals as delivered to the other party or parties involved?**

7.29 It seems worthwhile to pause momentarily at this point in order to draw together the threads of the discussion and the law reform proposals thus far. Their effect would be to allow remote contracting parties who have each executed a printed version of their contract to deliver their respective documents electronically and also, importantly, to be confident that, where any document was probative, the original version is held by the sender as

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[49] See *Park, Petrs* 2009 SLT 871 (OH), mentioned above at paras 5.9 and 8.7.
[50] For English law see paras 6.5-6.20 above.
[51] See paras 7.33-7.45.
[52] See fn 34 to para 7.19 above.
[53] Gretton and Reid, *Conveyancing* (4th edn, 2011), para 3.04, where the learned authors also comment that "it is difficult to see any good reason for this practice".
[54] See para 7.14 above.

delivered to the other party or parties and to have full probative effect. So, for example, a party may send the signed document by fax, or may scan it and send the PDF version as an email attachment. The recipient's copy would be evidence, if required,[55] of the principal's existence at the date and time of the electronic transmission, while all the principals would be held to be delivered and to complete the contract in probative form. Given that Scots law already recognises an exchange of counterpart documents each signed by its respective party as a contract,[56] we think that the reforms we propose here would go a long way to meeting the difficulties that have hitherto been perceived in this area of practice.

Electronic signatures

7.30 So far we have been discussing documents and signatures made in visible form on a durable medium; typically a document with a wet-ink signature written or printed on paper. However, the relatively recent development of electronic writing, characterised as being composed of data rather than letters, has given rise to the possibility – now a reality – of electronic signatures. The extension of the concept of a signature to embrace the possibilities of digital technology began for the Member States of the European Union, with the E-Signatures Directive in 1999.[57] This defined "electronic signature" as "data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication."[58]

7.31 The definition is implemented in section 7 of the Electronic Communications Act 2000, which provides:

> "(1) In any legal proceedings–
>
> (a) an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data, and
>
> (b) the certification by any person of such a signature,
>
> shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data.
>
> (2) For the purposes of this section an electronic signature is so much of anything in electronic form as–
>
> (a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and
>
> (b) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both.
>
> (3) For the purposes of this section an electronic signature incorporated into or associated with a particular electronic communication or particular electronic data

[55] Eg in the event of the sender's counterpart being lost or destroyed for any reason, in which case the document might become the subject of an action of proving the tenor (for which see Margaret L Ross and James Chalmers (eds), *Walker and Walker: The Law of Evidence in Scotland* (3rd edn, 2009), ch 20, and Rules of the Court of Session, Ch 52). Although proving the tenor is most often associated with lost wills, it can be used for other forms of lost or destroyed documents, see eg *Stewart v Henderson* [2007] CSOH 14 (deed of variation) and *Pocock's Tr v Skene Investments (Aberdeen) Ltd* [2011] CSOH 144 (disposition).
[56] See paras 6.26-6.29 above.
[57] Directive on a Community framework for electronic signatures [1999] OJ L 013/12. DCFR I.-1:107 also recognizes the validity of electronic signatures in line with this Directive.
[58] Ibid, Art 2(1).

> is certified by any person if that person (whether before or after the making of the communication) has made a statement confirming that–
>
> (a) the signature,
>
> (b) a means of producing, communicating or verifying the signature, or
>
> (c) a procedure applied to the signature,
>
> is (either alone or in combination with other factors) a valid means of establishing the authenticity of the communication or data, the integrity of the communication or data, or both."

An electronic signature may, therefore, include names typed into an email or word-processed document, or electronic facsimiles of a "wet ink" signature transmitted electronically by way of faxes or scanned versions in PDFs attached to emails.[59] An electronic signature can only be applied to an electronic document, since it must be attached to or logically associated with other electronic data.

7.32 The DCFR distinguishes between a "simple" and an "advanced" electronic signature. A "simple electronic signature" is one that meets the definition in section 7(2) of the Electronic Communications Act 2000. An "advanced electronic signature" is defined as an electronic signature uniquely linked to and capable of identifying the signatory, created using means which can be maintained under the signatory's sole control and linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.[60] We will henceforth use this terminology of "simple" and "advanced electronic signature" and seek in the following paragraphs to explain both the nature of the distinction and the respective legal effects of such signatures both present and prospective.

Simple electronic signatures

7.33 The substantive effect of section 7 of the 2000 Act is to make an electronic signature admissible in evidence in any legal proceedings in relation to any question as to the authenticity or integrity of the communication or data into or with which it is either incorporated or logically associated. Section 7 is thus enabling rather than a direct statement that a party's electronic signature is capable of manifesting an intention to be bound by the electronic writing to which it is linked; but this is clearly the result. Authenticity is defined in section 15(2) as meaning whether or not the electronic document has been electronically signed by the given person. Integrity is defined as meaning whether or not there has been any tampering with or modification of the document. As we will see immediately below,[61] not all electronic signatures guarantee integrity and authenticity but an advantage of some types of electronic signature is that they can actively identify whether a document has been altered after execution. In this respect they are better than a witnessed

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[59] But it seems that an email address automatically inserted by the internet service provider upon transmission of the email and including the sender's name is not an electronic signature when that name does not appear in the body of the email: *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543.

[60] See DCFR I.-1:107(4). RoW(S)A refers to advanced electronic signatures as "digital signatures", eg s 2A. However, the LR(S)B will repeal s 2A of RoW(S)A and the definition of "digital signature" in the interpretation provision. Instead, the LR(S)B uses "electronic signature": see sch 3, para 19(a)(vii).

[61] The changes to RoW(S)A proposed by the LR(S)B will mean that an electronic document is only valid if the electronic signature is, inter alia, "created by the person by whom it purports to have been created": s 9B(2)(b) of RoW(S)A, as prospectively inserted by s 93(2) of the LR(S)B. It will be seen below that advanced electronic signatures are self-proving in this respect, but for other electronic signatures (eg a name typed at the end of an email) the onus will lie with whoever wishes to rely on the signature to prove that it was created by the person by whom it purports to have been created.

paper document. But even under section 7, however, (and the same applies under the LR(S)B) an electronic signature cannot be used to meet the present requirements of probativity in Scots law since an electronic document cannot enjoy self-proving status.

Advanced electronic signatures

7.34 The "certification" of electronic signatures with legal effects going beyond admissibility as evidence is also recognised in the E-Signatures Directive and section 7(3) of the Electronic Communications Act 2000.[62] It is therefore clear that certification by a third party certification service provider (CSP) goes a crucial step further than making the electronic signature admissible as evidence; the signature becomes a means of establishing the authenticity and/or the integrity of the document with which it is connected. The certificate is issued to a party that has satisfied the CSP of its identity. The certificate itself is digital, or electronic, and takes the form of what are called a 'pair of keys', one 'private', the other 'public'. Each of these is a unique string of prime numbers expressed in binary digits, or 'bits', and is paired with the other. The user of the electronic signature has a unique digital identifier such as a 'smartcard' operating via a card reader and software supplied for this particular purpose, and protected by a personal identification number (PIN). Via the activation of this identifier on the computer where the electronic document is held, the user applies its private key to the electronic document, thereby applying an electronic signature to it, and makes the document, which now includes the electronic signature, available to its intended addressee.

7.35 The technical effect of applying the private key can be described as 'locking' the document electronically so that it can only be opened by a person who holds a copy of the sender's public key and applies that to the document upon receipt. The private key closes the document while the public key opens it. The sender who wishes to communicate the content of an electronic document must therefore first issue its public key to the intended recipient. This key is thus 'public' only in the sense that it has been transmitted to a person other than the sender; it is not a key that is publicly available to anyone who wants it unless the key-holder makes it so. Opening the document with the public key confirms that the relevant paired private key was used to apply the previous signature. A further crucial point is that, if the document has been changed in any way since the private key was used to sign it, this will be revealed and dated on the electronic document itself. This will also show on any print-out of the document, which will include text providing the information in the advanced electronic signature, i.e. identification of the owner of the electronic signature that has been applied and the date of its application. The electronic signature is thereby provided with an authenticating device in the same way as the "wet ink" signatures of witnesses to the "wet ink" signature of parties in relation to documents, and is indeed a more powerful tool in providing an assurance of the identity of the signatory and the integrity of the document thus signed.

Multiple signatories

7.36 The application of multiple advanced electronic signatures to an electronic document is technically possible. What is needed is that each party after the first to sign should receive the public key with which it will then be able to open the electronic document.

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[62] This provision is quoted at para 7.31 above.

Thereafter each such party can apply to the document its own advanced electronic signature, using its own private key for the purpose. Each can also check on the application of other parties' electronic signatures to the document, both before and after its own signing, using the originating party's public key to access the document in whatever its currently signed state may be. They can also see whether there have been any intervening alterations to the document itself.

7.37 The E-Signatures Directive and the Electronic Communications Act 2000 envisaged the emergence in the private sector of "trusted third party certification service providers" for digital certification of electronic signatures;[63] but for various reasons, such innovations have not yet occurred in the United Kingdom. The complex questions of liability emerging from such a scheme of identification of persons, certification and distribution of electronic signatures have been off-putting for potential CSPs in the private sector, as have the high costs involved in operating such an infrastructure on the open business market. The demand has also been quite uncertain. The market in the United Kingdom will not have been encouraged by the recent insolvency of a Dutch CSP whose security had been breached by hackers, exposing the risks involved on all sides.[64]

Electronic execution of electronic documents

7.38 As already noted,[65] the LR(S)B will, inter alia, significantly amend RoW(S)A to make possible the electronic execution of "electronic documents", defined as "documents which, rather than being written on paper, parchment or some other similar tangible surface are created in electronic form".[66] Electronic documents are to be contrasted with "traditional documents", that is, "documents written on paper, parchment or some similar tangible surface".[67]

7.39 Once the Bill is passed and has come into force, electronic writings meeting certain other requirements will be capable of having a number of legal effects hitherto only available with traditional writings. It will become possible to use electronic documents to conclude contracts for the creation, transfer, variation or extinction of a real right in land[68] and execute other juridical acts for which formal writing is required by RoW(S)A by the application to the electronic writing of an electronic signature or signatures. Formal validity will be achieved by the application to the electronic document of a 'simple electronic signature', subject to any further requirements for such signatures that Scottish Ministers may decide.[69] The Bill provides that a formally valid electronic offer may be met by an equally valid electronic acceptance; this establishes a framework for electronic missives.[70]

7.40 It will also be possible for an electronic document to have probativity. This will result from the application to the document of an advanced electronic signature, of the kind

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63 For a brief account see our Report on Land Registration, Vol 1 (Scot Law Com No 222, 2010), paras 34.20 (and its fn 21), and 34.68-34.69.
64 See BBC News Online, 20 Sept 2011, "Hacked security firm closes its doors", available at http://www.bbc.co.uk/news/technology-14989334.
65 See paras 7.8-7.15.
66 LR(S)B, s 93(2). The quoted definition forms part of a proposed new s 9A of RoW(S)A.
67 See also s 94 of and sch 3 to the Bill, inserting a new Pt 2 ("Traditional Documents") into RoW(S)A. The quoted definition forms part of a proposed new s 1A of RoW(S)A.
68 LR(S)B, s 93(2), introducing a new s 9B into RoW(S)A.
69 Ibid, introducing a proposed new s 9C(2)(a) into RoW(S)A.
70 Ibid, introducing a proposed new s 9B(3) into RoW(S)A.

described in the previous section.[71] An electronic document will be presumed to have been authenticated by the granter if the following conditions are met:

- it bears to have been so authenticated,
- nothing in the document indicates that it was not so authenticated, and
- the electronic signature of the granter that is incorporated into or logically associated with the document meets such requirements as Scottish Ministers may by regulation prescribe.[72]

7.41 The basic approach here is expected to be that certification will be the condition of probativity, with the level of certification required being such as to provide verification not only of the identity of the person signing the electronic document but also of the date of signing and the state of the document at that time. The advanced electronic signature will be the equivalent of subscription, witness signature and testing clause or its equivalent in traditional documents. In its nature, its attachment to an electronic document will give that document the appearance of one that has been signed by the party by whom it purports to be signed, and that it is the document to which the signature was applied and not some other version thereof or, indeed, some other document altogether. Of course, neither of these apparent facts may be true, since the advanced electronic signature may have been misappropriated or mis-used, or its security broken; but it will be for the party so contending to prove such claims, as would also be the case with claims that "wet ink" signatures on probative traditional documents had been forged, or taken from another document to be applied to the one now in question.

7.42 There will, however, be nothing to prevent parties going beyond whatever the requirements of formal validity may be by applying such advanced electronic signatures to their electronic missives as will give them probative status just as in the present law and practice, missives are normally witnessed although they do not have to be. Again we think this must also hold good for parties using counterpart contractual documents in electronic form as, in our submission, it does in the case of traditional documents.[73] Electronic delivery could clearly be effective in an exchange of such electronic documents.[74]

7.43 We have already explained our view that the character of any document as "electronic" or "traditional" will for most if not all legal purposes be determined at the point of its execution, whether traditional or electronic, rather than by the medium in which it happens at any other point to be recorded. The basic approach in the Bill seems to be traditional execution for traditional documents, electronic execution for electronic documents. The Bill, as introduced, does not allow for the possibility of missives being a mixture of the traditional and the electronic; so a traditional paper offer cannot be accepted electronically.[75] The same would apply, we think, in the formation of a contract by execution in counterpart where the documents exchanged were in different mediums. Parties are thus compelled to contract in one medium or another; the two possibilities cannot co-exist for legal purposes.

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[71] See paras 7.34-7.35 above.
[72] LR(S)B, s 93(2), introducing a proposed new s 9C(1) to RoW(S)A.
[73] See para 7.22 above.
[74] LR(S)B, s 93(2), introducing a proposed new s 9F(1) RoW(S)A. See para 7.8 above.
[75] We think that this means that *Park, Petrs* 2009 SLT 871 (OH) would continue to be decided in the same way under the new law.

7.44 As we have already noted in our discussion of the requirement of delivery,[76] the traditional document can be found in digital as well as its hard copy form, whether as the initial word processed file, or as a PDF made later by machine-scanning or otherwise converting it. The traditional document can also be rendered in a digital copy by way of an electronic transmission between fax machines or computers embodying fax technology. Such actions are, we understand, common in the process of execution in counterpart. There is, however, a possible difficulty with the case where a traditional document is put into a digital form as a fax or a PDF. As we have already pointed out,[77] a party or parties who have executed a traditional document in probative form have a potential problem: electronic transmission by itself cannot make such a document a probative electronic one. The facsimile subscriptions and witness signatures that the copied document may embody will not suffice to give it probativity in its own right as an electronic document. That can only be achieved by the further application to that electronic document of the parties' advanced electronic signatures over and above any facsimile handwritten signatures that may be embodied in the digitised copy.

7.45 We conclude this section of our discussion with the observation that the passage of the LR(S)B's amendments to RoW(S)A will make it possible for parties to create a contract as an electronic document to which electronic signatures can be applied by the parties, remotely if necessary; and that use for this purpose of advanced electronic signatures meeting the requirements to be laid down by the Scottish Ministers will give that electronic document probative status. The distinction between traditional and electronic documents may still bite, however, in the process of remote all-party signings or execution in counterpart where paper copies are executed with subscriptions in handwriting and then electronically transmitted by way of fax or as PDF attachments to emails. Unless advanced electronic signatures are additionally applied to these now electronic documents, they will not have the probativity that their preceding traditional versions may have had.

Effecting alterations to documents to be signed or already signed

7.46 A major issue which we have been told often arises even at the advanced stages of a physical or remote signing process, or can even require the holding of a further process if it arises only after one has already taken place, is the need to correct mistakes or make other alterations in the documents to be signed or that have already been signed. Section 5 of and Schedule 1 to RoW(S)A lay out a scheme for making alterations to probative documents which are either to be signed or have already been signed by subscription of the party or parties thereto. The effect of following the procedures laid out in RoW(S)A is either that the alterations are presumed to form part of the document eventually signed or, in the case of the document already signed pre-alteration, subsequent alterations bearing to have been signed by the granters are presumed to have been so signed.

7.47 Alterations are defined to include interlineations, marginal additions, deletions, substitutions, erasures or anything written on an erasure.[78] This definition clearly suggests a legislative assumption that the alteration process is one carried out upon a traditional document. Where the document is being produced by electronic means, however, whether or not it is to be a traditional or an electronic document that constitutes the eventual contract,

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[76] See para 7.10.
[77] See para 7.11.
[78] RoW(S)A, s 12(1).

alteration can be effected electronically so that it is not immediately perceptible to ordinary human faculties in the final version of the document.[79] Professors Gretton and Reid observe: "Until the 1980s, alterations were quite common. Now, with computers in almost universal use, they are rare, although not unknown."[80]

7.48 In general section 5 of RoW(S)A distinguishes between pre- and post-subscription alterations to subscribed documents. An alteration made *before* the document is subscribed by the granter or, where there is more than one granter, by the granter first subscribing it, is part of the document thereafter subscribed.[81] If the alteration is made *after* the document is or begins to be subscribed, the alteration itself must be signed by the granter or (as the case will typically be in our main scenario of execution in counterpart) all the granters.[82] Thus, for example, in addition to the obvious case where the alteration is made after all parties have subscribed the original contract document, if the document is subscribed by the first party and an alteration is then made before the second party subscribes, both will have also to sign the alteration. All this, while feasible in physical signing ceremonies, poses significant potential difficulties for remote signings.

7.49 The timing of the alteration has to be proved only if the question is raised. The fact that an alteration was pre-subscription may be established by all relevant evidence, whether written or oral.[83] A post-subscription alteration which has been appropriately signed by the parties is unlikely to be challenged on the question of its timing alone. The issue is much more likely to be one of fraud, forgery or other grounds of challenge such as force and fear or undue influence.

7.50 If the document is put into probative form, however, it becomes possible for alterations to enjoy the benefits of a number of further presumptions if they are made in accordance with either section 5(4)-(6) of or schedule 1 to RoW(S)A. The presumptions throw the burden of proof on the party who would show the contrary.

7.51 There will first be a presumption that an alteration to a probative document subscribed by all its granters was made *before* the document was subscribed by the granter first subscribing it, and that the alteration forms part of the document, provided two pre-conditions beyond the probativity of the document itself are met.[84] The first is that the document itself or its testing clause or equivalent state that the alteration was made before the document was subscribed by any party.[85] The second pre-condition is that nothing in the document or in its testing clause or equivalent indicates that the alteration was made after the first subscription.[86] While a testing clause or equivalent can be inserted or adjusted pre-subscription in either a physical or a remote signing process, the second pre-condition necessitates a check that there are no resulting inconsistencies in the document as a whole.

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[79] With electronic documents an active investigation may uncover the process of adjustment that lies behind the current appearance of the text but it is important to recall that probativity is concerned only with appearance; see para 7.20 above.
[80] Gretton and Reid, *Conveyancing* (4th edn, 2011), para 17.09.
[81] RoW(S)A, s 5(1)(a).
[82] RoW(S)A, s 5(1)(b).
[83] RoW(S)A, s 5(3).
[84] RoW(S)A, s 5(4).
[85] RoW(S)A, s 5(5)(b).
[86] RoW(S)A, s 5(5)(c).

7.52 Where the above pre-conditions for the presumption of the validity and effectiveness of an pre-subscription alteration to a probative document are not met, there are of course no such presumptions. But an application may be made to the court which, if satisfied that the alteration was indeed made before the subscriptions, causes the document to be endorsed with a certificate to that effect or, where the document has already been registered in the court books,[87] grants decree to that effect.[88] As already noted, all relevant evidence, whether written or oral, may be led to establish that an alteration was made before subscription by the granter or the granter first subscribing where there were several granters.[89] There is, however, little guidance or precedent otherwise available on this court procedure. It does not seem likely that a visit to court will be an attractive option during a remote signing process, even if it could be a relatively swift and simple matter. Either alterations to the documents have to be avoided or the full-blown procedure followed of revising testing clauses or their equivalent and checking for inconsistencies as described in the previous paragraph.

7.53 *Post*-subscription alterations of a probative document are covered in schedule 1 to RoW(S)A. This again includes the situation where a document is subscribed by the first party and an alteration is then made before the second party subscribes.[90] Such an alteration will be presumed to have been signed by the granter if the following conditions are met:

- it bears to have been signed by the granter and by a witness to the granter's signature,
- the alteration, or the testing clause or its equivalent, bears to state the name and address of the witness, and
- nothing in the document or alteration, or in the testing clause or equivalent, indicates that the alteration was not signed by the granter as it bears to have been so signed, or that it was not validly witnessed.[91]

Where there is more than one granter, each will have also to sign the alteration. As previously noted this, although feasible in signing ceremonies where all parties are present, poses significant difficulties for remote signings. There are again provisions enabling one person to sign once as a witness to the signatures of multiple granters.[92]

7.54 Where the alteration, or the testing clause or equivalent additionally bear to state a date or place of the granter signing the document, and nothing in the document, alteration or testing clause or equivalent indicates that that statement is incorrect, there is a further presumption that the alteration was indeed signed by the granter on the date or at the place stated.[93] Finally, in cases where either this presumption or the one that the granter has signed the post-subscription alteration cannot be applied, there may, as with pre-subscription alterations, be an application to court for appropriate certification of the

[87] As is possible only for documents with probative status: RoW(S)A, s 6.
[88] RoW(S)A, s 5(6).
[89] RoW(S)A, s 5(3)
[90] RoW(S)A, s 5(8).
[91] RoW(S)A, Sch 1, para 1(1). The conditions for valid witnessing are set out in Sch 1, para 1(4).
[92] RoW(S)A, s 7(5) and Sch 1, para 1(6).
[93] RoW(S)A, Sch 1, para 1(8).

document which has the effect that the presumptions can be applied.[94] Evidence is given by affidavit unless the court otherwise directs.[95]

7.55 The rules just described may be extended to electronic documents by the LR(S)B, once again building upon and extending recommendations made in our Report on Land Registration. The Scottish Ministers will, however, be empowered to make further regulations on any alterations made to an electronic document, whether before or after authentication by such an electronic signature. What these regulations will say is as yet unknown. In the nature of electronic documents, it is unlikely that any pre-subscription alteration will be apparent on the face of the document's immediately visible text in the way that it will be with a traditional document. So the major issue is likely to be any alterations made to a document after the application to it of the first electronic signature.

7.56 As we have already seen,[96] a key benefit of the advanced electronic signature which gives probativity to an electronic document is that of integrity, i.e. it confirms whether or not the document has been altered since the signature was applied. Where, after electronic execution of an electronic document has begun, parties find alterations to their document to be necessary, these can be made but it will be apparent on the face of the document that one or more of the electronic signatures was applied before the alteration was made. Thus those parties who signed the pre-alteration version will have to re-sign the document in its new form if it is to retain probativity. While not convenient, this electronic signing process will be considerably less inconvenient than the need with traditional documents for all parties and also witnesses to sign the alterations, and to have an appropriate testing clause or equivalent inserted in the document.[97]

Signature pages

7.57 In England, the practice of attaching pre-signed paper signature pages to paper contract documents helps in particular to avoid difficulties where these documents have to be the subject of last-minute alterations during the process of execution, whether physical or remote, but especially the latter. Is it possible for a similar approach to be adopted in Scotland instead of the more cumbersome and formalistic processes laid down for traditional documents in RoW(S)A, and if not, should it be?

7.58 So far as we are aware, the key decision underpinning English practice, *Koenigsblatt v Sweet*,[98] has never been referred to in Scotland, let alone followed or applied. (We discuss this and the related cases in the early part of Chapter 6.) We think that simply sending an electronic version of a signed signature page or using a signature page signed in advance of finalising a contractual document is not enough for that to be a valid signature of the contract in Scots law. We think that the difficulties of Underhill J in the *Mercury* case[99] would be shared by his Scottish colleagues, and we agree with the comments made on this matter by Dr Ross Gilbert Anderson:

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[94] RoW(S)A, Sch 1, para 2.
[95] RoW(S)A, Sch 1, para 2(3).
[96] See para 7.35.
[97] See para 7.53.
[98] [1923] 2 Ch 314 (CA); see paras 6.14-6.16.
[99] *R (on the application of Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721 (Admin).

> "The idea that signature pages be detached from one document and attached to a different document might be thought to be consistent only with fraud. Scottish solicitors involved in completions under English law, therefore, should use the guidance on English completions with care. … Taking a signature page from one document and affixing it to another is null and void for a document that requires writing (a composite copy of the same document may, however, be compiled for filing or "bible" purposes). For documents that do not require writing, express client authorisation should be obtained, and further consideration given to whether such a document, for the purposes of formal validity, bears to have been executed by the granter."[100]

7.59 The position in Scots law (and, of course, under equivalent rules in English law) is that signatures need not be those of the parties themselves; another person, for instance a solicitor, may sign on a party's behalf. This will involve a mandate such as a power of attorney which is a familiar feature of a number of areas of practice. Mandates are generally seen as instances of agency, that is, an authorisation of a person to act on another's behalf and to bind that other so long as the act is within the scope of the authority given.[101] If, however, it is the party's signature which is to be put on the document, there is some protection in Scots law against possible fraud of the kind outlined in the previous paragraph. This is because of the requirement that to be effective a subscription must appear at the end of the document text, so that a signature page would have to embody at least the last line of that text. This makes it at least extremely difficult to take the subscription of one document and attach it to something altogether different. And although section 7(3) of RoW(S)A allows that where there is more than one granter of a document the requirement that granters subscribe it at the end of its last page is satisfied if at least one granter does so while the remainder sign on an additional page, we also doubt whether that additional page could without more be switched to a document altered in some way from that to which it was first attached.

7.60 On the other hand, it is possible for an intending signatory to authorise another to perform an act that, by manifesting the signatory's intention to authenticate a particular document, can be treated as a signature. The attachment of a properly authorised and duly signed signature page can meet these requirements. We note that in England the Law Society's Practice Note warns of increasing levels of risk with the option of using signature pages and advises practitioners:

> "[For] the use of pre-signed signature pages, you should have clear evidence, such as an exchange of e-mails, that the signatories, their lawyers or someone else authorised by the signatory have authorised the attachment of their signatures to the final version of the relevant contract. This will avoid any evidential concerns and show an intention to be legally bound, as well as ensuring the certainty of contractual terms."[102]

It may be that in Scotland too a more formal and deliberate process of authorisation (or later ratification) than that found in *Koenigsblatt* – enabling the application of an electronic or other signature by someone other than the signatory – could be effective to cover both the case of a signature page being transmitted electronically during a remote signing process

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[100] Ross Gilbert Anderson, "Fax and email in corporate completions" 2010 SLT (News) 73 at 74-75.

[101] See generally Laura J Macgregor, "Agency and Mandate" in *The Laws of Scotland: Stair Memorial Encyclopaedia Reissue* (2002), paras 18-28 (Mandate) and paras 49-74 (Agent's authority). Strictly speaking, mandates are gratuitous contracts only, whereas agency need not be gratuitous.

[102] See the discussion of the Practice Note at paras 6.10-6.20 above.

and that of a "wet ink" signature page prepared in advance of the finalisation of a traditional contract document. The law of agency is, of course, relevant here. It is common for an agent to be authorised to sign a document for and on behalf of its principal – the signing of missives by solicitors on behalf of clients buying and selling heritable property is a typical example. No huge step is involved in the idea of a client providing its solicitor with a signature page and authorising its application to a particular document.

7.61 We therefore ask whether it would be useful to confirm by a legislative statement the existence of the possibility in Scots law that an agent could be authorised to attach a pre-prepared signature page to a document so long as it complied with the requirements of subscription to a formally valid or probative document, and whether it is necessary to add in any further protection against fraudulent misuse of a signature page. We would, however, also invite comment on whether, if this possibility already exists in Scots law, it should be disallowed in future on the ground that it is too open to misuse.

43. (a) Would it be useful to confirm the existence of the possibility of advance authorisation or subsequent ratification of the application of a signature page to a contractual document other than one relating to land in Scots law by any legislative statement to that effect?

(b) Is it necessary to add in any further protection against fraudulent misuse of a signature page and, if so, what form should that protection take?

(c) Or if this possibility already exists in Scots law, should it be disallowed as being too open to fraudulent misuse?

Conclusion

7.62 It is clear from what has gone before that the law on delivery, probativity and signature is tolerably clear for documents signed on paper, though where delivery is attempted by other than physical means difficulties can be encountered. Our proposals aim to remove those difficulties both by making the law clearer and by bringing it more into line with what commercial practice would find useful and convenient, especially in relation to execution in counterpart. The present law relating to electronic execution will be much improved through the changes to be brought about by the LR(S)B, although we think that yet further developments should be considered. It seems clear, however, that the changes to be made by the LR(S)B already enable the development of a suitable electronic solution to the problem of parties wishing to conclude a contract in probative form without having to meet to go through a traditional all-parties signing ceremony. It is to this potential solution that we turn in the next, and final, chapter of this Discussion Paper.

Chapter 8 A Further Proposal: Taking Advantage of the Electronic Approach

Introduction

8.1 The preceding discussion in Chapter 7 has made clear, we think, that the amendments to RoW(S)A by the LR(S)B will go a considerable way to enabling the use of electronic documents and electronic transmission of traditional documents for the formal constitution of a written contract. The use of electronic documents will in turn greatly facilitate the completion by remote parties of the execution of a contract so as to give it probative status. The basic procedure would involve first the preparation (and, perhaps, the negotiation) of the contractual document in electronic form (which is what already happens in almost all cases).[1] The next step would be making the final version of the document available for remote and advanced electronic signing. This could be in a secure space managed by one of the parties or, probably more likely, the solicitors responsible for the final version of the document, but to which the other parties could be granted remote access. It would then be possible for the signing parties to apply their respective electronic signatures to the electronic document. If the signatures were advanced ones, the document would gain probative status for all parties once their signatures had been fully applied. From that point on, the system would enable each party to download an electronic copy of the fully signed document, to be held as its fully authenticated and probative version of the document.[2] Alternatively, there may be a central administrator of the signing process who oversees the application of the advanced electronic signatures and the eventual transmission to all parties of electronic copies of the fully signed documents.

Two major hurdles

8.2 All this is technically feasible and will be legally effective once the relevant amendments to RoW(S)A under the provisions of the LR(S)B come into force. However, two major practical obstacles may exist. One is the availability and security of advanced electronic signatures: as we have already noted,[3] the market for these signatures has not developed very far – especially in the UK – and the private sector CSP is exposed to the risks inherent in any market-based operation. The other difficulty is whether contracting parties and their advisers will have the computing facilities that will enable them to provide the necessary secure space to which only they will have access.

Overcoming the first hurdle

8.3 The solution to the problem of the availability of advanced electronic signatures may, however, lie very close to hand in Scotland, where Registers of Scotland (RoS) have already

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[1] See para 8.8.
[2] We develop a further suggestion about this possibility from para 8.7 below.
[3] See para 7.37.

developed a system of advanced electronic signatures for solicitors using the Automated Registration of Title to Land (ARTL) process. The ARTL process applies to electronic dispositions, assignations of long leases, standard securities and their assignation or discharge. As a result, many conveyancers already have advanced electronic signatures. It may well be that the use of advanced electronic signatures will grow further in respect of RoS-related business, developing and going beyond the ARTL system. We also understand that the Law Society of Scotland proposes to issue advanced electronic signatures to all its members and to all those qualifying as solicitors in future.[4] These developments will support the use of advanced electronic signatures in the electronic missives which will become possible once the LR(S)B's amendments of RoW(S)A come into force. The question is whether the use of these or other similar advanced electronic signatures might extend to the formation and constitution of other kinds of contract. In our analysis, there seems no reason why not.

8.4 The use of a solicitor's ARTL electronic signature on behalf of a client requires written authority from the latter in the form of a mandate in a style provided by the Law Society of Scotland.[5] Something similar will be required in the commercial transaction where, as will probably be the usual case, a commercial client does not have an advanced electronic signature to apply to a contract document in electronic form and therefore the solicitor's one will be necessary if the execution is to be completed to full effect. There appears to be nothing in the present law to prevent the creation and use of such mandates.

Overcoming the second hurdle

8.5 With regard to the second problem – the computing facilities needed to operate a system in the way outlined above – we believe that this should be possible for most commercial law firms of any size in Scotland. But we think that the ability to take advantage of technology in this way should not be restricted to those with the resources to provide the facilities themselves. We also suspect that in at least some situations, contracting parties may have concerns about the capacity of one of them, or of the managing advisers, to carry the process through satisfactorily. Contracting parties may also have issues of trust in relation to the preservation of the integrity of documents. Both of these factors could inhibit use. We noted with interest a comment made to the Economy, Energy and Tourism Committee of the Scottish Parliament by Fiona Letham, partner in the prominent commercial law firm of Dundas & Wilson, when giving evidence in relation to the LR(S)B and the ARTL system:

> "[T]here is an opportunity to replace the ARTL system with something much broader that would work for the majority of transactions. We would support such a change. In this day and age, we should go down the e-conveyancing route, including electronic contracts, which there is currently no possibility of doing. Our having

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[4] See Scottish Parliament Official Report Debate Contributions, Economy, Energy and Tourism Committee, 11 January 2012, for evidence of Ross MacKay (Law Society of Scotland) on the LR(S)B.

[5] See Law Society of Scotland, Solicitors (Scotland) (ARTL Mandates) Rules 2006, available at http://www.lawscot.org.uk/media/50508/artl_rules.pdf. See also Gretton and Reid, *Conveyancing* (4th edn, 2011), para 8.23; Report on Land Registration: Vol 1 (Scot Law Com No 222, 2010), paras 34.62-34.64.

electronic deeds of every type, rather than just being limited to transfer deeds as we are, is an aim that should definitely be pursued ..."[6]

While Ms Letham's comment should not be wrenched too far from its land registration and commercial conveyancing context, its preference for a central facility for the completion of transactions is one that we think appropriate to the wider commercial context with which we are primarily concerned in this Part of our Discussion Paper.

8.6 This background leads us to think that some alternative facility for electronic completion of commercial transactions as formal and, indeed, probative contracts may be useful. One possibility is that the market will provide such alternatives if there is enough demand for them; but the relationship between supply and demand in this context might be rather like the proverbial question about the chicken and the egg. Further, the same sort of fears about potential liabilities that have so far prevented the emergence of a significant market for the services of CSPs in relation to electronic signatures might well deter any newcomers from entry. Prospective customers might in turn have concerns about the suppliers' solvency and stability. A key point in long-term commercial projects may be the need to access documents many years after they have been signed. There are also potential issues about changes to the contracting parties following take-overs, assignations and insolvencies. The extent to which a private sector supplier subject to the vicissitudes of the marketplace could meet this kind of need is uncertain.

A new scheme: an electronic contract repository

8.7 Having regard to all these considerations, we asked RoS whether it might be interested in providing an electronic facility in which the electronic execution of electronic contract documents might be carried out by the contracting parties, and whether it sees any technological obstacles to developing such a facility. RoS is a body unlikely to fall victim to the market due to its crucial public role and pre-existing technical infrastructure. It is also very well-known to the Scottish legal profession. We received a positive and encouraging reply, and have had very helpful meetings with the RoS management team and the LR(S)B team. From this it emerged that RoS would be interested in developing a facility that would meet the need identified by us, provided that it is reasonably clear that there would be sufficient interest in using it and that revenue would be generated in sufficient quantity to meet the costs of setting up the facility and running it thereafter. The LR(S)B enables the Keeper to provide consultancy, advisory or other commercial services which need not relate to the law and practice of registration, and for which the terms on which the services are provided (including fees) may be agreed between the Keeper and those provided with the services in question.[7] There would accordingly be no issue about the *vires* of setting up a repository for electronic documents for the purpose of enabling their execution as formal contracts with full probativity. It would not even be necessary for the contract to be subject to Scots law apart from its execution, or for the parties to be Scottish, since they could either mandate their Scottish solicitor to apply the latter's own electronic signature on their behalf, or acquire from RoS the certificated electronic signatures needed for the purpose, or, if a

[6] Scottish Parliament Official Report Debate Contributions, Economy, Energy and Tourism Committee, 11 January 2012.
[7] LR(S)B, s 104.

foreign party's existing electronic signature meets the requirements for the effectiveness of such signatures laid down by the Scottish Ministers, use that one.[8]

8.8 The technological possibilities are myriad and the system that we envisage could work in various ways but the basic example is that negotiating parties would reach a stage at which a final electronic version of their contract appeared to have been concluded. This negotiation could take place in the usual manner that parties were accustomed to or could be facilitated centrally by the repository. Either way, a solicitor of one of the parties would be appointed by them as the coordinator of the execution process. The coordinator would upload the electronic document to the repository provided by RoS. Each of the parties would be given access to the document, initially, to check that the uploaded document reflected the agreed text (whether this document was negotiated prior to uploading or dynamically within the facility provided by the repository). At the stage of approving the agreed text, any alterations could be made by the coordinator. The process of execution by the parties' application of their respective advanced electronic signatures could then begin, again under the supervision of the coordinating solicitor. If alterations to the text became necessary during the execution of the document, the reapplication of previously applied advanced electronic signatures to the now altered text could also take place. The process would be capable of extending to a collection of related documents all forming part of a single transaction, or indeed of multiple transactions.[9] Once the process of execution was complete, each of the parties would be able to download to its own systems the fully executed document or documents. It would be for the parties to decide whether also to leave a version in the repository for preservation purposes. If an electronic document contains appropriate consents, it may also become possible to register it in an electronic Books of Council and Session, the creation of which is enabled by section 96 of the LR(S)B.[10]

8.9 It seems to us after our preliminary discussions with RoS that it may well be possible to set up a repository along the lines set out above that would enable parties to make effective use of the new rules on electronic documents introduced by the LR(S)B. Before we enter into further discussions with a view to developing a fully detailed proposal, however, we would like to know whether our perception of the possible advantages of such a system is shared by those who would be expected to use it. It would also be extremely helpful to know as much as possible about any technical issues – whether related to technology, law, or legal and commercial practice – which could affect the prospects of the system being used and being successful. We of course anticipate that if interest in the general idea is confirmed there would be an ongoing dialogue in developing more detailed proposals. There is no point in designing a system to facilitate business if that system is then ignored or

[8] Note also the proposed new s 9G to be inserted in RoW(S)A by s 93(2) of the LR(S)B, which allows the Keeper to register in the Books of Council and Session a document the formal validity of which is governed by a law other than Scots law, provided that the Keeper is satisfied that the document is formally valid according to that other law. This means, inter alia, that the document in question does not have to be in probative form under the law of Scotland to be registered.

[9] See further para 8.16.

[10] Section 96 of the LR(S)B provides that the Scottish Ministers may, by regulations, make provision to enable the recording or registration of electronic documents in any register under the management and control of the Keeper. However, registration in an electronic Books of Council and Session would not retain confidentiality for the document as the Books of Council and Session is a public register and any documents registered there – whether for preservation or preservation and execution – would be available to the public from the point of registration. See further paras 8.13-8.14.

barely used because it lacks user-friendliness or does not do what users want it to do. At this stage, however, we ask only:

44. (a) Do consultees share our perception that if an electronic document repository were to be set up by Registers of Scotland it would be of use to contracting parties wishing to execute formal contracts remotely? Would such a system also be of use in the negotiation of such contracts?

(b) What might affect the prospects of any such system being used and being successful?

(c) Would interested consultees be willing to assist us in developing a detailed proposal for such a system, covering all relevant technical, legal and commercial issues?

8.10 An important issue will be the charges for the service. We understand that the charging structure for a contract repository would not be designed for profit but only to meet the costs of setting up and running such a facility. Although it is not possible to provide figures for the charges to be applied for use of a contract repository without knowing the likely volume of users and who will be the digital certificate provider, the cost of setting up and running the contract repository would most likely be spread between the issuing of certificates and the transactional costs. There are three points of user interaction with the system where a fee could be charged:[11] first, upon the issue and periodic renewal of digital certificates; second, for lodging a document in the contract repository; third, for access to the document held in the repository after it had been fully executed. It would be very difficult to base any charge upon the value of the contract or contracts being placed in the repository, since that value would frequently – if not invariably – be extremely difficult to calculate in advance of performance. At present, RoS only charge on the value of the transaction for transfers of title etc in the Land Register of Scotland and the General Register of Sasines. Registration of standard securities in these two registers and registration of deeds (including leases) in the Books of Council and Session is subject to a single fixed fee. In the light of this:

45. We invite comment on possible fee structures for the use of the repository.

8.11 We do not envisage any system set up by RoS in implementation of the ideas being canvassed here would enjoy any monopoly or exclusivity. Parties would be free to use their own systems for the purpose, and nothing would preclude the entry into the market of private providers in competition with RoS for the business. We ask:

46. Would consultees prefer to use their own systems or those of another provider in preference to the suggested RoS repository?

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[11] RoS does not, at present, charge separately for issuing an advanced electronic signature; the cost of ARTL smartcards is incorporated into registration fees and users are charged on an event basis (ie per registration) rather than through a subscription fee. The search service – Registers Direct – is a separate online fee charging service that does not require the use of ARTL smartcards.

Specifications for an electronic contract repository

8.12 The specifications for the repository that we have so far identified and considered in discussion with RoS include the following: it must be (i) completely confidential, (ii) secure, (iii) designed in such a way that all documents relating to a particular transaction are clearly linked and marked, and (iv) durable for the long term yet capable of allowing parties to remove a document if they so wish. We deal with each of these below.

(i) The system must be completely confidential

8.13 It seems clear that, unlike the registers maintained by the Keeper, there can be no question of the contents of the proposed repository being open and accessible to the public other than to the contracting parties themselves. Subject to what we say below, the Keeper and the RoS staff should likewise have no access to the content of the documents in the repository. RoS inform us that it is possible to create a repository for electronic documents in which RoS would be able to guarantee at any point that a given document exists in the repository and that its content is as supplied to the repository but, provided that the document is appropriately encrypted, RoS would have no access to the contents of the document in question.

8.14 There may be a question as to whether the repository facility would be open to freedom of information requests. We think that this would probably not be the case where the contracting parties were not public bodies;[12] but if the legislation establishing the repository were to provide expressly that disclosure of its content was forbidden subject only to court order made on specified grounds,[13] the absolute exemption from disclosure under section 26(a) of the Freedom of Information (Scotland) Act 2002 would apply.[14] There is legislative precedent for the Keeper to hold documents confidentially, albeit in a provision of the Administration of Justice Act 1982 that was never brought into force.[15] We therefore ask:

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[12] Section 3(2)(a)(i) of the Freedom of Information (Scotland) Act 2002, provides that information is not held by the public authority (and therefore not disclosable by that public authority) if it is held on behalf of another person; arguably this is the very nature of a repository. This argument would not assist parties to contracts involving publicly-owned companies as defined in s 6 of the 2002 Act and local authorities detailed in para 21 of sch 1 to that Act. See Kevin Dunion, *Freedom of Information in Scotland in Practice* (2011), paras 1.46-1.47. Note that there is no equivalent provision in the Environmental Information (Scotland) Regulations 2004 (SI 2004/520). As yet, the freedom of information regime has not been extended to private bodies working within the public sector, though this was the subject of the Scottish Government *Consultation on Extending the Coverage of the Freedom of Information (Scotland) Act 2002* (see http://www.scotland.gov.uk/Publications/2010/07/20123725/0).

[13] There may be difficulties here if the document has been encrypted and the Keeper has no means of unlocking it. The issue might be solved if the forms of encryption allowed were all in some way subject to the use of a 'master' or 'skeleton' key which could be used by the Keeper only with the authorisation of a court.

[14] In relevant part the section, which is headed "Prohibitions on disclosure", reads: "Information is exempt information [ie not disclosable by a public authority] if its disclosure by a Scottish public authority (otherwise than under this Act) – (a) is prohibited by or under an enactment ...". See further Kevin Dunion, *Freedom of Information in Scotland in Practice* (2010), paras 1.216-1.224 for the case law on this provision. Note that, yet again, there is no equivalent provision in the Environmental Information (Scotland) Regulations 2004 (SI 2004/520).

[15] Administration of Justice Act 1982, s 23(1)(b), which would have enabled the Keeper to provide a repository for the wills of living persons. See also its s 25 which would have enabled the making of regulations on the conditions for the deposit of a will, and as to the manner of and procedure for deposit and registration of a will, the withdrawal of a deposited will and the cancellation of a registration. Section 26 is in force and makes provision for fee-charging.

47. Should any legislation implementing a proposal for an electronic document repository expressly exclude any disclosure of a document contained therein, subject to the power of the court to order disclosure on any ground on which a contracting party could be compelled to disclose?

48. (a) Do consultees have any comments on what forms of security (for example, encryption) might be appropriate, given the need for disclosure on the order of a court?

(b) Are there any other issues that should be thought about here, such as changes to the contracting parties resulting from take-overs, assignations, insolvencies and the like?

(ii) The system must be secure

8.15 RoS confirmed that it would be possible to set up an automated system which could be operated only by a central administrator appointed by the parties (probably from amongst their professional advisers). Steps would be taken to ensure that this system was user-friendly. The administrator would upload the draft electronic document, specify permissions for access, downloading, and (where appropriate) editing, and oversee all other administrative steps, including opening for the application of electronic signatures, carrying out alterations, and closing the document once the signature process was complete. We therefore propose:

49. Any legislation implementing a proposal for an electronic document repository would provide for operation of the system only by an administrator appointed by the parties to the electronic document, with powers to oversee the whole process of concluding a contract on the basis of the document. Parties would be free to specify the authority to be enjoyed by the administrator.

(iii) The system must be capable of linking together all documents pertaining to a transaction

8.16 Many commercial transactions and projects involve multiple contracts which must all be executed before the prospective funder will conclude the contract under which the funding for the project will begin to be released. It is therefore important that the repository be capable of establishing a portfolio of prospective contracts relating to such contracts. RoS confirmed to us that this kind of linkage is possible and that administrator permissions could be set to control either a single document or a series of related documents. It does not seem to us that this is necessarily a matter for provision in primary legislation, but we ask:

50. Should any legislation implementing a proposal for an electronic document repository provide for the linkage in the system of all documents relating to a particular transaction or project; or should this be a task for the administrator of the transaction's progress towards completion in the repository?

(iv) While parties should be free to withdraw their document from the repository at any time, the system must also be capable of holding documents pertaining to a transaction for indefinite periods of time

8.17 As has already been mentioned,[16] it may be necessary to refer to documents that were created many years before. While there should be no barrier to parties withdrawing their document from the repository at any time before or after execution has been completed, it may be an additional attraction of the suggested system that RoS can provide a very high degree of certainty as to its own continuity, and may be more secure in that way than any other form of custody available to the parties and their advisers. We do not know the extent to which post-execution formal contracts are in fact referred to apart from when disputes or litigation arise, and whether parties would value a secure repository as a place to keep documents for preservation and also for reference purposes and would welcome comment on that. We therefore make the following proposal and ask two related questions:

51. Any legislation implementing a proposal for an electronic document repository should provide for the freedom of parties to withdraw their document from the repository at any time before or after its execution.

i) For how long should it be possible to maintain a document in the repository?

ii) For what purposes might a document held in the repository be used by parties, whether the original contracting parties or those who become parties to the contract later (as assignees, for example)?

[16] See para 8.6.

Chapter 9 List of Questions and Proposals

1. Would there be an advantage in having a comprehensive statutory statement of the law on formation of contract? Consultees may wish to reflect further upon this matter once they have considered the detailed discussion of the present law and specific possible reforms set out in later chapters of this Discussion Paper, as well as the summary of our proposals set out in Appendix A.

(Para 1.28)

2. Do consultees agree that any comprehensive statutory statement of the rules on formation of contract should define its scope to make clear that it is not concerned with the validity of the contract or of any of its provisions?

(Para 1.30)

3. Do you know of any information or statistical data, or have any comments on any potential economic impacts either of the current law relating to the formation of contract or of any proposed reform of that law?

(Para 1.36)

4. Should any statutory restatement of the law on formation of contract provide that in general any relevant statement of a party's intention should have effect only when its intended addressee should have become aware that it had been made?

(Para 2.27)

5. In any statutory restatement of the law on formation of contract should there be specific rules on when a communication is taken to reach its addressee (for example, when the communication is delivered to the addressee personally or at its business address or habitual residence), or is this better left for assessment by the court in the circumstances of the case?

(Para 2.28)

6. In any statutory restatement of the law on formation of contract would it be useful to have a specific rule on when an electronic communication is taken to reach its addressee (for example, when the communication becomes accessible to the addressee on its communications system)? Or can this too be better left for assessment by the court in the circumstances of the individual case?

(Para 2.29)

7. Any general legislative restatement of the law relating to formation of contract should not include any definition of 'writing'.

(Para 2.31)

8. Should a provision on usages and practices be included in any statutory restatement of the law on formation of contract?

(Para 2.35)

9. In any statutory restatement of the law on formation of contract, an offer should be defined as a proposal made to one or more specific persons containing sufficiently definite terms to form a contract and indicating the intention of the offeror to be bound if the offer is accepted by the other party or parties.

(Para 3.7)

10. In any statutory restatement of the law on formation of contract (and without prejudice to the possible application of the law on unilateral promises), it should be stated that a proposal made to the general public and so not to one or more specified persons is not an offer unless it otherwise meets the criteria for an offer.

(Para 3.8)

11. In any statutory restatement of the law on formation of contract, should a proposal to supply goods from stock at a stated price made by a business in a public advertisement or a catalogue, or by a display of goods, be treated, unless the circumstances indicate otherwise, as an offer to supply at that price until the stock of goods is exhausted?

12. If so, should a similar rule apply in the case of supply of services?

13. Should any such rule be subject to party autonomy? Or is it preferable to leave the whole matter to the general definition of what may be an offer to the public proposed at question 10?

(Para 3.13)

14. In any statutory restatement of the law on formation of contract, there should be a rule that an offer becomes effective when it reaches the offeree.

(Para 3.15)

15. In any statutory restatement of the law on formation of contract, there should be a rule that an offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

(Para 3.19)

16. In any statutory restatement of the law on formation of contract, there should be a rule that an offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.

(Para 3.21)

17. The rule that an offer made to the public can be revoked by the same means as were used to make the offer should be added to the list of those for adoption in any statutory restatement of the rules on formation of contract.

(Para 3.23)

18. The rule that an offer may indicate that it is irrevocable, or state a fixed time for its acceptance, in which case it is irrevocable should be added to the list of those for adoption in any statutory restatement of the rules on formation of contract.

(Para 3.25)

19. Should an offeree's reasonable reliance on the irrevocability of an offer make any subsequent revocation of the offer by the offeror ineffective?

(Para 3.27)

20. A rule like that in Article 40(4) of the proposed CESL should be enacted for the Scots law of contract, regardless of whether or not there is a general legislative restatement of the rules on formation of contract.

(Para 3.29)

21. In any statutory restatement of the law on formation of contract, there should be a general rule that when a rejection of an offer reaches the offeror, the offer lapses.

(Para 3.31)

22. Should there continue to be a rule that offers lapse upon a material change of circumstances? If so we propose that it should be included in any statutory restatement of the Scots law on formation of contract.

(Para 3.33)

23. In any statutory restatement of the law on formation of contract, it should be provided that an offer should cease to be capable of acceptance as a result of the death or loss of capacity of either party before the conclusion of the contract.

(Para 3.38)

24. Should it be enacted for the avoidance of doubt that the apparent or practical insolvency of either an offeror or an offeree prior to the acceptance of an offer has no effect upon the existence or effectiveness of the offer or any acceptance thereof, subject to any provision to the contrary by the parties, express or implied?

(Para 3.42)

25. a) Should any statutory restatement of the rules on formation of contract include rules on the application of time limits contained in offers which have been delayed in their transmission to the intended recipients?

b) To what extent are the rules in Section 49 of the US Restatement (2d) Contracts a model to be followed in this regard?

(Para 3.45)

26. A rule that any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer should be included in any statutory restatement of the law on formation of contract, along with a further rule that silence or inactivity by the offeree does not normally indicate acceptance.

(Para 4.5)

27. Do consultees agree that the general rule on when an acceptance becomes effective and concludes a contract should be when the indication of assent reaches the offeror?

(Para 4.7)

28. There is no need to introduce in any statutory restatement of the law on formation of contract an exception for postal acceptances to the proposed rule that an acceptance is effective when it reaches the offeror.

(Para 4.13)

29. Were there to be a statutory restatement of the law on formation of contract it should be provided that the sending of an acceptance by the offeree will prevent a subsequently arriving revocation of the offer taking effect.

(Para 4.14)

30. Were there to be a statutory restatement of the law on formation of contract in which the general rule was that acceptance concluded a contract when it reached the offeror,

a) should provision be made for an exception for performance of an act uncommunicated to the offeror in cases where:

i) the offer itself so provides, expressly or impliedly,

ii) the parties have established a practice to that effect between themselves,

iii) there is a usage to that effect?

b) should such a rule also state that a contract is concluded when the offeree begins to perform the required act?

(Para 4.15)

31. In the event of any statutory restatement of the law on formation of contract, the rules on time limits for acceptance should enable the offeror to fix a time limit for acceptance, with the limit for acceptance otherwise being a reasonable time after the offer was made.

(Para 4.18)

32. If a rule about when uncommunicated acts may be effective acceptances (like that suggested in question 30 above) is adopted in any statutory restatement of the law on formation of contract, there should also be a rule that the act must be performed within any time limit fixed by the offeror, or within a reasonable time after the offer is made.

(Para 4.19)

33. In any statutory statement of the law on formation of contract, would a rule that a period of time stated for an acceptance begins to run from the moment that the offer reaches the offeree, subject to any contrary express statement in the offer or any other indication to the contrary implicit in the offer or in the relevant surrounding circumstances, be useful?

(Para 4.20)

34. a) Do consultees agree that, in general, when a purported acceptance states different terms from those contained in the offer to which it is a reply it should be treated as (i) a rejection of the offer; and (ii) a new or counter-offer? (This would not prevent the possibility that agreed terms from the first offer could be incorporated expressly or impliedly in the new or counter-offer.)

b) If not, would consultees prefer the solutions contained in the DCFR and the proposed CESL i.e. that a purported acceptance should only have the effect of rejecting the offer and becoming a counter-offer if the difference between the two statements was material?

c) If option b) is preferred,

i) would a non-exclusive definition of materiality along the lines found in the CISG Article 19(3) be useful?

ii) should the effect of non-material differences be that a contract is formed with the addition of the additions and alterations contained in the acceptance, subject to the offeror's contrary stipulation in the offer or objection without undue delay upon receipt of the acceptance?

iii) should it also be possible for the offeree making an acceptance with non-material differences from the offer to require the offeror's assent thereto within a reasonable time before a contract is formed?

(Para 4.30)

35. Should any statutory restatement of the rules of formation of contract include a provision to the effect that, if an acceptance which arrives late shows that it was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed?

(Para 4.33)

36. If there was to be a rule under which a late acceptance could nonetheless conclude a contract, should there be a further rule that this effect would not arise where there had been a material change of circumstances since (a) the acceptance was first sent; or (b) the expiry of the time limit contained in the offer?

(Para 4.34)

37. In the event of the abolition of the postal acceptance rule, there should be enacted a rule by which an acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

(Para 4.37)

38. Are consultees aware of problems surrounding the 'battle of the forms' being significant in practice? Are the problems surrounding the 'battle of the forms' confined to transactions involving the sale of goods, or are the problems wider?

(Para 5.1)

39. Is there a need for a specific solution to the problem of the battle of the forms? If so, should that solution be along the lines suggested by the PICC, the DCFR and the proposed CESL? If uncertainty is a concern with that solution, how might that best be ameliorated?

(Para 5.23)

40. If the answer to question 39 above is no, might there still be merit in making provision that, in respect of long-term commercial relationships only, an approach other than a strict offer-and-acceptance one is to apply in battle of the forms situations? If so, are the schemes in the PICC, the DCFR and the proposed CESL of any assistance in this context? To what sort of long-term commercial relationships might such an approach be applied?

(Para 5.25)

41. For the avoidance of doubt, the new section 9F of the Requirements of Writing (Scotland) Act 1995, which will allow electronic documents to be delivered electronically or by such other means as are reasonably practicable, subject to the intended recipient's agreement or what it is reasonable in all the circumstances for the intended recipient to accept, should be extended to cover all documents, including traditional ones, and not restricted to electronic ones.

(Para 7.15)

42. Should it be made clear by legislative provision that an exchange of counterpart contractual documents can satisfy the requirements of formal validity and probativity if each document is appropriately executed by the respective parties to the exchange who further, where the documents are electronically delivered, also agree to hold the originals as delivered to the other party or parties involved?

(Para 7.28)

43. (a) Would it be useful to confirm the existence of the possibility of advance authorisation or subsequent ratification of the application of a signature page to a contractual document other than one relating to land in Scots law by any legislative statement to that effect?

(b) Is it necessary to add in any further protection against fraudulent misuse of a signature page and, if so, what form should that protection take?

(c) Or if this possibility already exists in Scots law, should it be disallowed as being too open to fraudulent misuse?

(Para 7.61)

44. (a) Do consultees share our perception that if an electronic document repository were to be set up by Registers of Scotland it would be of use to contracting parties wishing to execute formal contracts remotely? Would such a system also be of use in the negotiation of such contracts?

(b) What might affect the prospects of any such system being used and being successful?

(c) Would interested consultees be willing to assist us in developing a detailed proposal for such a system, covering all relevant technical, legal and commercial issues?

(Para 8.9)

45. We invite comment on possible fee structures for the use of the repository.

(Para 8.10)

46. Would consultees prefer to use their own systems or those of another provider in preference to the suggested RoS repository?

(Para 8.11)

47. Should any legislation implementing a proposal for an electronic document repository expressly exclude any disclosure of a document contained therein, subject to the power of the court to order disclosure on any ground on which a contracting party could be compelled to disclose?

48. (a) Do consultees have any comments on what forms of security (for example, encryption) might be appropriate, given the need for disclosure on the order of a court?

(b) Are there any other issues that should be thought about here, such as changes to the contracting parties resulting from take-overs, assignations, insolvencies and the like?

(Para 8.14)

49. Any legislation implementing a proposal for an electronic document repository would provide for operation of the system only by an administrator appointed by the parties to the electronic document, with powers to oversee the whole process of concluding a contract on the basis of the document. Parties would be free to specify the authority to be enjoyed by the administrator.

(Para 8.15)

50. Should any legislation implementing a proposal for an electronic document repository provide for the linkage in the system of all documents relating to a particular transaction or project; or should this be a task for the administrator of the transaction's progress towards completion in the repository?

(Para 8.16)

51. Any legislation implementing a proposal for an electronic document repository should provide for the freedom of parties to withdraw their document from the repository at any time before or after its execution.

i) For how long should it be possible to maintain a document in the repository?

ii) For what purposes might a document held in the repository be used by parties, whether the original contracting parties or those who become parties to the contract later (as assignees, for example)?

(Para 8.17)

APPENDIX A

OUTLINE OF BASIS FOR FORMATION OF CONTRACT (SCOTLAND) BILL

In this Appendix we have assembled for the convenience of consultees the texts from the CISG, PICC, DCFR and proposed CESL which, on the basis of our provisional proposals and questions set out in Chapters 2-5 above, we think might form the basis for working out the draft of a comprehensive statutory statement of the law on formation of contract. Apart from giving an indication of what such a comprehensive statutory statement might cover, the Appendix is a quick way of seeing what the effects of our specific proposals would be on the present law. Sections highlighted in bold involve a clear change or addition to present Scots law. Italicised sections are those removing a doubt or uncertainty in present Scots law. Two sections state present Scots law but without the exceptions currently provided by the postal acceptance rule.

Scope (*Source:* RFC draft Bill)

This Act is without prejudice to the operation of any enactment or rule of law which –

(a) provides protection against unfair contract terms, or protection for any special category of contracting party;

(b) requires writing for the constitution of a contract or prescribes a form for a contract; or

(c) regulates any question relating to the formation of a contract which is not provided for by this Act.

OR

1. The rules in this Act govern only the formation of contract… In particular, except as otherwise expressly provided in this Act, they are not concerned with … the validity of the contract or of any of its provisions or of any usage …

Freedom of contract (*Source:* proposed CESL art 1)

(1) Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.

(2) Parties may exclude the application of any of the following rules, or derogate from or vary their effects, except as otherwise provided.

Requirements for the conclusion of a contract (*Source*: proposed CESL art 30)

(1) A contract is concluded if:

(a) the parties reach an agreement;

(b) they intend the agreement to have legal effect;

(c) the agreement, supplemented if necessary by rules of law, has sufficient content and certainty to be given legal effect.

(2) Agreement is reached by acceptance of an offer or by other statements or conduct.[1]

(3) Whether the parties intend the agreement to have legal effect is to be determined from their statements and conduct.

(4) Where one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached.

Usages and practices **(***Source*: DCFR II.-1:104)

(1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves.

(2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such a usage would be unreasonable.

(3) Usages and practices do not bind the parties to the extent to which they conflict with the express terms of the contract or any mandatory rules of this instrument.

Notice (*Source:* proposed CESL art 10)

(1) "Notice" includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.

(2) A notice may be given by any means appropriate to the circumstances.

(3) A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.

(4) A notice reaches the addressee:

(a) when it is delivered to the addressee;

(b) when it is delivered to the addressee's place of business or, where there is no such place of business or the notice does not relate to a business matter, to the addressee's habitual residence;

(c) in the case of a notice transmitted by electronic means, when it can be accessed by the addressee; or

(d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could reasonably be expected to obtain access to it without undue delay.

[1] Note here, however, the discussion at paras 2.6-2.12 above.

(5) A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.

Offer (*Source:* proposed CESL art 31)

(1) A proposal is an offer if:

(a) it is intended to result in a contract if it is accepted; and

(b) it has sufficient content and certainty for there to be a contract.

(2) An offer may be made to one or more specific persons or to the public.

Business proposal to supply goods at stated price (*Source:* DCFR II.-4:201(3))

(3) Unless the circumstances indicate otherwise, a proposal by a business to supply goods at a stated price, made by a display of goods or made in a public advertisement or a catalogue referring to an identified stock, is an offer to supply them at that price until the goods displayed or the stock is exhausted.

When offer effective **(***Source:* CISG art 15; PICC art 2.1.3)

(4) An offer becomes effective when it reaches the offeree.

Revocation of offer (*Source:* proposed CESL art 32)

(1) An offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance[2] or, in cases of acceptance by conduct, before the contract has been concluded.

(2) Where a proposal made to the public is an offer, it can be revoked by the same means as were used to make the offer.

(3) A revocation of an offer is ineffective if:

(a) the offer indicates that it is irrevocable;

(b) the offer states a fixed time for its acceptance; or

(c) it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

(4) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Right of withdrawal (*Source:* proposed CESL art 40(4))

Where the consumer has made an offer which, if accepted, would lead to the conclusion of a contract from which there would be a right to withdraw <u>*under the Consumer Protection*</u>

[2] This rule continues the result but not the postal acceptance reasoning of *Thomson v James* (1855) 18 D 1.

(Distance Selling) Regulations 2000 the consumer may withdraw the offer even if it would otherwise be irrevocable.

Rejection of offer (*Source:* proposed CESL art 33)

When a rejection of an offer reaches the offeror, the offer lapses.

Lapsing of offer[3]

An offer lapses and is no longer capable of acceptance if after it is made but before a contract is concluded –

(a) there is a material change of circumstances;

(b) the offeror dies, or becomes incapable;

(c) the offeree dies, or becomes incapable.[4]

Effect of insolvency[5]

An offer does not lapse if after it is made either the offeror or the offeree or both become insolvent.

Delayed offer (*Source:* Restatement (2d) Contracts § 49)

(1) Delay of an offer in transit does not extend the time during which the offeree can accept if the offeree knows or has reason to know of the delay.

(2) If the delay is due to the fault of the offeror or the means of transmission adopted by the offeror, and the offeree neither knows nor has reason to know of it, the time within which the offeree can accept is extended by the delay.

Acceptance (*Source:* proposed CESL art 34)

(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.

(2) Silence or inactivity does not in itself constitute acceptance.

Time of conclusion of the contract (*Sources:* CISG art 18; proposed CESL art 35)

(1) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.[6]

[3] See paras 3.32-3.38.
[4] To cause the offer to lapse the death or supervening incapacity of either party must occur before any acceptance reaches the offeror and concludes the contract. Different results arise if the death or incapacity occurs after the conclusion of the contract.
[5] See paras 3.39-3.42.
[6] Insofar as this rule knows no exception for the postal acceptance concluding a contract at the time of posting, it would change Scots law.

(2) Where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror.

(3) Where by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by doing an act without notice to the offeror, the contract is concluded when the offeree begins to act.

Time limit for acceptance (*Source*: proposed CESL art 36)

(1) An acceptance of an offer is effective only if it reaches the offeror within any time limit stipulated in the offer by the offeror.[7]

(2) Where no time limit has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time after the offer was made.

(3) Where an offer may be accepted by doing an act without notice to the offeror, the acceptance is effective only if the act is done within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

(*Source:* proposed CESL art 11(6))

(4) Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee.

Modified acceptance (*Source:* proposed CESL art 38)

(1) A reply by the offeree which states or implies additional or different contract terms which materially alter the terms of the offer is a rejection and a new offer.

(2) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are presumed to alter the terms of the offer materially.

(3) A reply which gives a definite assent to an offer is an acceptance even if it states or implies additional or different contract terms, provided that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.

(4) A reply which states or implies additional or different contract terms is always a rejection of the offer if:

> **(a) the offer expressly limits acceptance to the terms of the offer;**
>
> **(b) the offeror objects to the additional or different terms without undue delay; or**

[7] Insofar as this rule knows no exception for the postal acceptance concluding a contract at the time of posting, it too would change Scots law.

(c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

Late acceptance (*Source:* proposed CESL art 37)

(1) A late acceptance is effective as an acceptance if without undue delay the offeror informs the offeree that the offeror is treating it as an effective acceptance.

(2) Where a letter or other communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed.

Withdrawal of acceptance (*Source:* CISG art 22)

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.[8]

Conflicting standard terms (*Source:* proposed CESL art 38)

(1) Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard terms, a contract is nonetheless concluded. The standard terms are part of the contract to the extent that they are common in substance.

(2) No contract is concluded if one party:

(a) has indicated in advance, explicitly, and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or

(b) without undue delay, informs the other party of such an intention.

[8] This rule possibly states the result, although not the reasoning, of *Countess of Dunmore v Alexander* (1830) 9 S 190.

APPENDIX B

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